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Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

Contact:(617)727-2200

GOVERNMENT DOCUMENTS
COLLECTION

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LAW ENFORCEMENT
NEWSLETTER

February 1995

Letter from the Attorney General: Renewed Efforts in Preventing and Fighting Crime

To Members of the Law Enforcement and Criminal Justice Community:

In this, the first Law Enforcement Newsletter of my second term as Attorney General, I would like to take the opportunity to discuss our renewed determination to fight and prevent crime in the Commonwealth in the coming years. Since our last issue, there have been a number of positive developments in law enforcement and the criminal justice system. This Newsletter will update you on these developments.

I. State Law Enforcement Legislative Developments and New Initiatives

At the end of 1994, the Legislature took a significant step, which I strongly and actively supported, and enacted a law creating an electronic "Warrant Management System." Through this system, police departments, courts, and the Registry of Motor Vehicles will have immediate access, through the Criminal Justice Information System, to arrest warrants issued in any jurisdiction in the Commonwealth. By law, a printout of this Warrant Management System information will constitute a "true copy" of the warrant for all law enforcement purposes, and police and court personnel will have immunity from liability for reliance on this information. In addition, the law permits courts where defendants are appearing to learn of warrants issued in other jurisdictions and to make bail determinations as to those other charges. Once this system is fully operational, law enforcement's efforts to serve warrants and to computerize, track, and enforce default warrants will be significantly advanced. A summary of the Warrant Management System legislation is included later in this Newsletter.

A recent Supreme Judicial Court decision, *Commonwealth* v. *Jacobsen*, also discussed later in this Newsletter, suggested that in responding to domestic violence incidents, police may not make a warrantless arrest for the misdemeanor of threatening to commit a crime, even when there is probable cause to believe that the victim reasonably fears imminent and serious bodily harm. To clarify the power of police to act quickly to protect victims, I have filed proposed legislation to explicitly permit warrantless arrests under these circumstances.

II. Security of Reproductive Health Care Clinics

I am proud of this Office's past and ongoing efforts to ensure the constitutional right of access to reproductive health care clinics. We have actively prosecuted blockaders whose physical presence at clinics has interfered with the provision of family

planning services. On September 30, 1994, I proposed an amendment to the Commonwealth's public records law to protect from disclosure the home addresses, phone numbers, and names of family members of police and correction officers, judges, prosecutors, providers of family planning services, and victims of adjudicated crimes.

The tragedy of the shootings at two Brookline clinics on December 30, 1994, however, has highlighted the continuing need for a concerted law enforcement effort to protect the rights of women to reproductive choice. In the aftermath of the shootings, together with the U.S. Attorney Donald Stern, District Attorney William Delahunt, U.S. Marshal Nancy McGillvray, Public Safety Secretary Kathleen O'Toole, State and local police, and clinic representatives, we have worked to identify and address clinic security needs and provide security assistance to reproductive clinics throughout the state. Through a security coordination committee under the direction of Secretary O'Toole, the Commonwealth has established a central State Police security contact to respond to threats, coordinated the deployment of state and local police officers to provide backup security at the clinics, and provided training to police officers and clinic staff regarding security issues. More information about clinic security and victim assistance is provided later in this Newsletter.

III. Federal Crime Bill

With the new Congress in place in Washington, D.C., the federal Crime Bill will be the subject of major debate, and possibly amendment or repeal, in the coming months. I will be following the debate carefully and will be in touch with you on any major developments. In the meantime, I will continue to work to identify funds available to Massachusetts police departments.

As part of that effort, I have met on a number of occasions with U.S. Attorney Stern and with Secretary O'Toole to discuss how to get the most out of the Crime Bill for Massachusetts law enforcement -- especially through the different COPS programs offered by the Department of Justice. We have sent out updates on the COPS MORE, COPS FAST, and COPS AHEAD programs, and we will continue to do so as we gather helpful information from DOJ.

One funding issue that we have been working on with DOJ is the use of the state Community Policing grant money by departments as part of the local match requirement. I, along with Secretary O'Toole, am sending a letter to Attorney General Reno to request formally that DOJ allow us to use the current Fiscal Year 1995 grants in that way. I am also working to obtain formal approval for Massachusetts police departments to use federal crime bill policing funds to pay for cadets while they are in the Academy. Originally, DOJ allowed cities and towns to use federal funds to pay only

for sworn officers, but Justice has now indicated that we can use the funds to pay salaries and benefits while the officers are in the Academy. We will keep you posted on both of these funding issues as well as on other important developments in the Crime Bill debate.

IV. From 1995 Forward

I was honored by the presence of numerous law enforcement professionals at my recent swearing-in for a second term as Attorney General. The theme of my swearing-in speech was one you will hear me address frequently in the coming years: The need for law enforcement and community partnerships, based on common-sense values, to help us attack the social and economic issues frequently found at the root of the public safety problems we confront on a daily basis.

Too often, society looks to the law as the sole solution to its problems. People believe that if something is not illegal, then it's OK. That is wrong. If we are serious about addressing the crime problems that face our Commonwealth, we must look beyond the law and beyond punishment. We must expect and demand more accountability from private individuals, and we must listen to the community's perspective on its problems and involve local residents in the search for answers.

The kind of partnerships that often occur between law enforcement agencies need to take root in the private sector -- among religious institutions, business and civic leaders, neighborhoods, and individuals. More laws and more money alone will not be enough to meet the challenge. We all must work together toward the common goal of community revitalization. Many of my second term initiatives and programs will reflect that goal.

I look forward to continuing to work together with you for the next four years. I invite your questions, comments, or suggestions regarding the initiatives discussed in this Newsletter or any other way we can better protect the public.

Sincerely,

Scott Harshbarger

ANNOUNCEMENTS

KEEPING OUR SCHOOLS SAFE: Comprehensive Approaches

Sponsored by Attorney General Scott Harshbarger
and the Massachusetts Department of Education

DATE: April 5 & 6, 1995

PLACE: Sea Crest Conference Center
North Falmouth, MA

FEE: $30.00 per person, per day

****

THIRD ANNUAL NON PROFIT BOARD MEMBER CONFERENCE

Sponsored by Attorney General Scott Harshbarger

DATE: May 8, 1995

PLACE: Royal Plaza Hotel
Marlborough, MA

FEE: TBD

****

For information and registration materials, please contact Sheila Martin, Conference Coordinator, at (617) 727-2200.

NEW LAWS/LEGISLATIVE ACTION

Chapter 247 of the Acts of 1994
"An Act Further Regulating the Warrant System"

Jennifer Renna Ferreira & Gregory I. Massing,
Assistant Attorneys General,
Criminal Bureau

On December 28, 1994, Governor Weld signed into law Chapter 247 of the Acts of 1994, An Act Further Regulating the Warrant System. The Act, effective February 1, 1995, replaced sections 23A, 29, 30, 31, and 32, and repealed section 67 of G.L. c. 276. It also amended G.L. c. 90, § 22; G.L. c. 248, § 26; and G.L. c. 280, §§ 6, 7.

SUMMARY

The Act is intended to reform the arrest warrant system in Massachusetts. The centerpiece of the legislation is the electronic "warrant management system," through which warrant information is available to the courts, police departments, and the registry of motor vehicles instantly by computer. The act also expands the jurisdiction for setting bail on a warrant arrest to the arresting court as well as the court where the warrant was issued, as well as giving arresting courts the power to discharge certain warrants from other jurisdictions. In addition, the law prohibits those who have outstanding warrants from obtaining or renewing their driver's license.

I. ISSUANCE OF WARRANTS

Under the new system, appearing in G.L. c. 276, § 23A, whenever a warrant is requested, the authority seeking the warrant must provide the court with the following information (to the extent known): name, last known address, date of birth, gender, race, height, weight, hair and eye color, offense for which the warrant is requested, whether the offense is a felony or misdemeanor, and any known aliases. The clerk of the court then enters this information, together with the name of the police department responsible for serving the warrant, into the computerized warrant management system (WMS). This information will be available to law enforcement agencies and the RMV through the Criminal Justice Information System (CJIS).

Once the above data is entered, the warrant is valid and considered delivered to the appropriate police department for service. The electronic information in WMS

constitutes the warrant, and a printout of the electronic warrant from CJIS qualifies as a true copy of the warrant.

Section 23A further requires the clerk's office, without unnecessary delay, to enter the removal or recall of a warrant into WMS. Any law enforcement official who in good faith acts upon information obtained through WMS and CJIS is immune from civil or criminal charges of false arrest, false imprisonment, or malicious prosecution

II. JURISDICTION TO SET BAIL

Under G.L. c. 276, § 29, as amended by the Act, before discharging or releasing on bail or recognizance any defendant appearing before it, the court must check WMS to determine if any outstanding warrants appear. If so, the court is authorized to make a bail determination. If the arresting court releases the defendant on bail or recognizance for the outstanding warrant, it must confer with the court that issued the warrant to assign a date for the defendant to appear in the issuing court. This information is then entered into WMS. If the arresting court decides not to release the defendant, the defendant is to be transported to the court that issued the warrant or, if court is not in session, to the jail of the county of the issuing court.

III. PROVISIONS REGARDING DEFAULTS

The statute allows the assessment of costs ($50) against a defendant who is in default if the default warrant must be recalled or if the defendant is arrested on the default warrant.

When a court issues a default warrant for failure to pay a fine, assessment, court costs, restitution, support payment, or other amount owed, the court is to specify this amount, plus the $50 assessment, into WMS. If another jurisdiction then retrieves this information regarding a defendant appearing before it, the other jurisdiction may accept payment of the amount specified, release the defendant, and notify the issuing court that the payment has been made. The issuing court then must recall the warrant and enter the recall on WMS.

IV. OTHER PROVISIONS

The Act creates G.L. c. 90, § 22(h), which prohibits the registrar from issuing, renewing, or reinstating the driver's license of a person who has an outstanding warrant appearing on WMS.

CONCLUSION

With the creation of WMS, Massachusetts takes a step into the age of information and now makes warrant information available instantaneously throughout the Commonwealth. Although the law took effect February 1, 1995, it may be some time before WMS is fully operational.

OTHER RECENT LEGISLATION

Chapter 201 of the Acts of 1994: Venue for Violations of 209A Orders

Effective March 9, 1995, this Act created G.L. c. 277, § 62A, which establishes venue for prosecution violations of 209A orders either in the jurisdiction in which the violation occurred, or in the jurisdiction in which the 209A order was obtained.

Chapter 168 of the Acts of 1994: Computer Crimes

Effective January 24, 1995, Chapter 168 created two new misdemeanors relating to the misuse of computers or computer systems. The first, G.L. c. 266, § 33A, makes it a crime to obtain access to a commercial computer service by false pretenses. The second, G.L. c. 266, § 120F, makes it a crime to knowingly gain access to a computer system without authority, or to fail to terminate such access once the user determines it is unauthorized. The need for a password or other authenticating data constitutes notice that the system is restricted. The Act also established venue for the above crimes where either the defendant or the data was physically located at the time of the violation. *See* G.L. c. 277, § 58A½.

Other amendments to the General Laws under this statute include allowing the use of a duplicate computer file at trial as if it were the original, G.L. c. 233, § 79K, and including electronically processed or stored data under the definition of "personal property" in G.L. c. 266, § 127, which criminalizes the wilful and malicious destruction of personal property.

DOMESTIC VIOLENCE DEVELOPMENTS

Diane S. Juliar, Chief,
Family and Community Crimes Bureau

Supreme Judicial Court Ruling: Warrantless Arrests For Threats When No Chapter 209A Order Is In Effect

The Supreme Judicial Court recently decided the case of *Commonwealth* v. *Jacobsen*, 419 Mass. 269 (1995), which affirms the ability of law enforcement officials to make warrantless arrests for certain misdemeanors in domestic violence cases, when no abuse prevention order is in effect. However, the Court appears to hold that this authority to make a warrantless arrest does not extend to arrests for acts solely constituting "Threats" under G.L. c. 275.

Under G.L. c. 275, §§ 2 and 3, a specific procedure is set forth for charging an individual threatening to commit a crime. The issue in *Jacobsen* was whether a warrantless arrest for Threats could properly be made, nonetheless, under the authority of section 6 (7)(b) of Chapter 209A.

The Court states that the standard that must be met under G.L. c. 209A, § 6(7)(b), in order to proceed with a valid warrantless arrest, is whether the victim is reasonably in "imminent fear of serious bodily harm." However, the decision indicates that a warrantless arrest may not lawfully be made if the evidence only supports a charge of threatening to commit a crime under G.L. c. 275, §§ 2 and 3, even if the victim reasonably fears imminent serious bodily harm.

The Court noted that conduct meeting the necessary standard would generally support a charge of "Assault" under G.L. c. 265, § 13A. Thus, officers seeking to effectuate a warrantless arrest under the "imminent fear" provision should carefully review the facts to determine whether or not the crime of assault may be charged, i.e., is there an overt, threatening or menacing gesture accompanying the verbal conduct, or an attempted battering.

Bear in mind that this ruling does not affect the ability to make warrantless arrests if officers have some other basis to make the arrest, such as the existence of a protective order, the commission of an assault and battery, or the commission of a felony. In emergency situations, officers may try to access the emergency judicial response system for assistance to seek the issuance of a complaint and arrest warrant for threatening to commit a crime, as well as to seek a Chapter 209A protective order.

In response to the *Jacobsen* decision the Attorney General has filed legislation to ensure that a police officer can make a warrantless arrest for Threats when the officer has probable cause to believe that the defendant's conduct constitutes threats and has

caused the victim to be in reasonable in fear of imminent serious bodily harm in domestic abuse cases.

Legislative Development: Interjurisdictional Arrests

Legislation sponsored by Attorney General Harshbarger was recently enacted to clarify the authority of police to make a warrantless arrest in their own jurisdiction for domestic abuse crimes committed in another jurisdiction, as long as they have been provided with information establishing probable cause. The new law expands G.L. c. 276, § 28, regarding arrest without a warrant, to include misdemeanors involving abuse as defined in Chapter 209A and assault and battery against a family or household member. This authority applies whether arrest is "mandatory" or the "preferred response" under Chapter 209A.

Pending Legislation: Attorney General's Domestic Violence Package

Attorney General Harshbarger and Senator James Jajuga recently proposed a comprehensive package of domestic violence legislation to be considered in the current legislative session. Certain key provisions of this bill include:

* Amendments to the stalking law, such as the elimination of the "threats" element.

* An amendment to the definition of Chapter 209A which clarifies that police responding to a domestic violence incident have the ability to determine whether there is probable cause to believe the parties are in a "substantive dating relationship."

* Amendments to the firearms provisions of Chapter 209A, including an amendment that would provide for mandatory arrest when police have probable cause to believe that a defendant is in possession of firearms or firearms permits, but is failing to surrender them upon being served with a court order mandating their surrender.

* Amendments to fully implement the provision of the federal Violence Against Women Act which provides that full faith and credit shall be given in each state to domestic violence restraining orders issued in any other state. These amendments modify Chapter 209A to enable courts and law enforcement officials to enforce out of state orders through criminal proceedings.

* Amendments to Chapter 209A to enable a plaintiff, who is unable to appear in court without severe hardship due to the plaintiff's physical condition, to obtain a

restraining order by telephone, with the assistance of a police officer, during regular court hours.

* An amendment to the marital disqualification that would eliminate the disqualification in cases involving a crime committed by one spouse against the other, where the substance of a conversation between the spouses would provide relevant and material evidence of the crime.

Violence Against Women Act of the Federal Crime Control and Law Enforcement Act of 1994

The Violence Against Women Act includes various types of grants to the states for the improvement and establishment of services and systems relative to domestic violence. Substantive provisions of the Act include:

* Provision that domestic violence protection orders in one state shall be given full faith and credit in the courts of any other state, and may be enforced as if it were the order of that state.

* Expansion of the federal prohibition of firearms transfers and possession to include persons who are subject to restraining orders.

* Provision to require the U.S. Postal Service to secure confidentiality of domestic violence shelters and abused persons' addresses, upon presentation of a valid, outstanding protection order.

* Provisions making new federal offenses for interstate acts of domestic violence, such as to travel across state lines with the intent to injure, harass or intimidate a spouse or intimate partner and, in the course of such travel, to commit a crime of violence that causes bodily injury to such spouse or intimate partner.

For more information on any of these Domestic Violence Developments, contact Assistant Attorney General Diane S. Juliar, Chief of the Family and Community Crimes Bureau of the Attorney General's Office, or Assistant Attorney General Carolyn Keshian, at (617) 727-2200.

VOTERS APPROVE SUNDAY STORE OPENINGS, SEATBELTS

Peter Sacks, Assistant Attorney General,
Administrative Law Division

Voters at the November 1994 state election were presented with two ballot questions of particular interest to the law enforcement community: Question 5, concerning Sunday store openings, and Question 2, concerning mandatory seatbelt use. Later in November, however, a widely publicized lawsuit was filed that challenged the legality of the election procedures and sought to overturn the results. This article explains the impact of Questions 2 and 5 and provides an update on the litigation.

Question 5, entitled "An Act Allowing Retail Stores and Shops to Open at Any Time on Sundays and Summer Holidays," was an initiative law and was approved by the voters. Question 5 inserts a new section, section 16, into G.L. c. 136. The new section 16 provides in pertinent part as follows:

> All stores and shops which sell goods at retail may be open at any time on Sundays and on Memorial Day, July Fourth and Labor Day. The performance of labor, business and work directly connected to retail sales on said days shall also be allowed. Stores and shops allowed to open under this section may sell on said days all types of goods and foodstuffs which may lawfully be offered for sale in the Commonwealth other than alcoholic beverages.

Section 16 provides that to the extent it is inconsistent with existing "Blue Laws" or any other laws, section 16 is controlling. Section 16 includes provisions regarding voluntariness of work and payment of time-and-one-half wages on Sundays. Also, the terms Memorial Day, July Fourth and Labor Day mean the legal holidays on which those days are celebrated.

Thus Question 5 means that chiefs of police will no longer be called upon to issue permits for retail stores to open on Sundays. No other Sunday closing laws are affected by Question 5. Specific questions about Question 5 or other Sunday closing laws may be directed to the state's Executive Office of Labor, at (617) 727-6573, or the state Department of Labor and Industries at (617) 727-3454.

The voters also approved Question 2, a referendum on the mandatory seatbelt law that was enacted by the Legislature just over a year ago and that took effect on February 1, 1994. The seatbelt requirement applies, with certain exemptions, to drives and passengers in private motor vehicles on public ways, and to passengers in vanpool

vehicles or trucks under 18,000 pounds on public ways. The law is to be enforced by law enforcement agencies only when a driver has been stopped for a motor vehicle violation or some other offense. Violations are punishable by fines, and citations may be challenged in the same way as are citations for other motor vehicle violations. But a violation is not considered a moving violation for motor vehicle insurance surcharge purposes.

In late November of 1994, four registered voters sued the Secretary of State, alleging that the procedures used to vote on the nine statewide ballot questions at the November election violated the state constitution and various election laws. The plaintiffs initially obtained a temporary restraining order (TRO) preventing the results of the vote on some of the ballot questions, including Question 5, from being certified as official. The Secretary appealed, and the TRO was modified so as to allow the results of Question 5 to be certified. As of now, both the Sunday store opening law enacted through Question 5 and the seatbelt law approved through Question 2 are in full effect.

In late December the Supreme Judicial Court ruled that the system for presenting ballot questions to the voters in November was constitutional. Under that system, instead of affixing the summaries of the ballot questions directly to voting machines, which was impractical given the large number of questions and the length of the summaries, voters in many cities and towns were supposed to be given a separate sheet of paper bearing the summaries. The SJC decided that this system was consistent with the constitutional requirement that the summaries appear "on the ballot," thus disposing of one of the two claims made by the plaintiffs.

The plaintiffs also claim, however, that in many places around the Commonwealth, the separate sheets bearing summaries were not actually given to voters as they prepared to vote. The plaintiffs claim that as a result, the outcome of the elections on the ballot questions should be overturned and a new election should be held. A lengthy trial will be required to resolve this remaining claim, and no starting date for the trial has been set.

For the time being, both the Question 5 Sunday store opening law and the Question 2 seatbelt law are in effect and should be followed. The Secretary of State is vigorously defending the case and does not think it likely that a new election would be ordered. In the unlikely event that the results of the voting on either question are invalidated, the law enforcement community will be promptly advised.

THE ENFORCEMENT OF LAWS PROTECTING PHYSICAL ACCESS TO MEDICAL FACILITIES

Judith E. Beals, Assistant Attorney General,
Family and Community Crimes Bureau, Public Protection Bureau

On November 3, 1993, Governor Weld signed into law G.L. c. 266, § 120E, "An Act Relative to Medical Facilities Access," otherwise known as the "Clinic Access Law." This law makes it a crime to knowingly obstruct access to a medical facility so as to impede the provision of medical services. Although applicable to all medical facilities, the legislative history of this statute makes clear that it was enacted primarily in response to a recent history of blockades and invasions of medical facilities that provide, among other things, abortion counseling and services.[1]

The Clinic Access Law supplements and, to some extent, parallels a permanent statewide court injunction issued by Massachusetts Superior Court Judge Peter Lauriat on October 28, 1991. That injunction was obtained by the Attorney General and private litigants in a civil action known as *Planned Parenthood League of Massachusetts, Inc. & Commonwealth of Massachusetts* v. *Blake*, 417 Mass. 467, cert. denied, 115 S. Ct. 188 (1994). It prohibits Operation Rescue, thirty-eight named individuals, and anyone acting in concert with them from, among other things, blocking access to facilities that provide abortion counseling or services. The permanent injunction (known as the "Amended Permanent Injunction" or "API") issued pursuant the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H-J. Violations of the API are, therefore, a criminal offense. *See* G.L. c. 12, § 11J.

Consequently, as of February 4, 1994, a blockade or invasion of any medical facility in the Commonwealth subjects the perpetrator to arrest and prosecution under the Clinic Access Law. A blockade or invasion of a facility that provides abortion counseling or services subjects the perpetrator to arrest and prosecution under the

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[1] In his statement accompanying the signing of the new law, the Governor stated that its purpose is "to protect the right of privacy by ensuring that women who wish to terminate a pregnancy or seek other reproductive health services are not impeded from free access to medical facilities . . . ." November 4, 1993, letter from William Weld to the Massachusetts Senate and House of Representatives.

Clinic Access Law and, in most cases, the API, as well as other general laws such as trespass and disorderly person statutes.[2]

This summary outlines the key features of both the Clinic Access Law and the API. It then provides a set of suggestions to police departments for responding to blockades or invasions of clinics. While, tragically, these topics are rendered more timely as a result of the December 30, 1994, shootings at two Brookline reproductive health care clinics, this article is primarily geared toward the enforcement of laws prohibiting less severe, but more common, forms of unlawful activities. Specifically, this article addresses the laws and court orders that prohibit the physical obstruction of access to reproductive health care clinics in the Commonwealth.

I. LEGAL ANALYSIS

A. Clinic Access Law, G.L. c. 266, § 120E.

General Laws c. 266, § 120E, provides in pertinent part that:

> Whoever knowingly obstructs entry to or departure from a medical facility or who enters or remains in any medical facility so as to impede the provision of medical services, after notice to refrain from such obstruction or interference, shall be punished . . .

"Medical facilities" are defined to include "any medical office, medical clinic, medical laboratory or hospital."

A violation of the Clinic Access Law subjects the perpetrator to initial penalties of up to six months in jail or a house of correction, up to one thousand dollars in fines, or both. Each subsequent violation of the statute is punishable by a minimum fine of five hundred dollars and a maximum fine of five thousand dollars, as well as up to two and a half years in jail or a house of correction, or both. The Legislature specifically provided that "[t]hese penalties shall be in addition to any imposed for violation of a court order." This provision ensures that individuals who are subject to, and in violation of, the API are not limited to the lesser penalties of first-time violations of the Clinic Access Law. It also recognizes wilful violation of a court order as a distinct infraction.

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[2] In addition, as of May 26, 1994, such actions also violate 18 U.S.C. § 248, the recently enacted federal "Freedom of Access to Clinic Entrances Act" or "FACE", which imposes additional criminal and civil penalties. This article, however, focuses primarily on state laws and injunctions. Copies of the state Clinic Access Law, Judge Lauriat's Amended Permanent Injunction, and the federal FACE statute are appended to this article.

1. Prohibited Conduct

The Clinic Access Law prohibits two distinct forms of conduct. First, it prohibits "obstructing entry to or departure from a medical facility." In *Planned Parenthood League of Massachusetts, Inc.* v. *Operation Rescue*, 406 Mass. 701, 715 (1990), the Supreme Judicial Court defined the term "obstructing access" so as to avoid First Amendment concerns. In the context of that case, the Court held that "obstructing access" means "the physical blocking of access either by . . . sitting or lying in entrance ways to prevent [persons] from entering or by the use of inanimate objects to achieve the same purpose." Likewise, the federal FACE act defines "physical obstruction" to mean "rendering impassable ingress to or egress from a facility that provides reproductive health services. . . or rendering passage to or from such a facility. . . unreasonably difficult or hazardous." 18 U.S.C. § 248(e)(4). Thus, a person who merely pickets or protests outside a medical facility is not in violation of clinic access laws. However, a person who obstructs access to a clinic, whether by blockading or invading the clinic, or by otherwise making it unreasonably difficult for patients or staff to enter or leave the clinic, is subject to arrest and prosecution even if such conduct is accompanied by song or advocacy.

Second, the Clinic Access Law prohibits "enter[ing] or remain[ing] in a medical facility so as to impede the provision of medical services." Notably, this prohibition encompasses two elements of proof. First, the defendant must have entered or remained in a facility (after notice to leave). Second, he must have done so, so as to impede the provision of medical services. This element should not necessarily require proof that services were being provided at the time of the crime. Thus, a person who enters a clinic and destroys equipment violates this section even if he does so on a day when the clinic is closed (provided, of course, that he previously had notice not to enter the clinic). In investigating and proving this element, law enforcement officials should be sensitive to the privacy rights of patients for whose protection this law was enacted. This element should be proven exclusively through the testimony of clinic personnel, without resort to appointment schedules, patient identities, or patient testimony.

2. Notice

The Clinic Access Law requires prior notice to the defendant to refrain from "such obstruction or interference." Notice is defined in the statute to include:

> (i) receipt of or awareness of the contents of a court order prohibiting blocking of a medical facility; (ii) oral request by an authorized representative of a medical facility, or law enforcement official to refrain from obstructing access to a medical facility; or (iii) written posted notice

outside the entrance to a medical facility to refrain from obstructing access to a medical facility.

Thus, proper notice of the API, or the posting outside a facility of either the API, the Clinic Access Law, or of language prohibiting equivalent conduct, should satisfy the notice requirement. Nevertheless, as discussed further below, a simple rule-of-thumb should guide police enforcement efforts on this issue. Prior to making any arrests for obstructing access to a clinic, each participant should be given explicit oral and/or written notice that failure to leave will result in arrest for violation of the Clinic Access Law and, if appropriate, the API.

B. **The Amended Permanent Injunction**

The Amended Permanent Injunction, unlike the Clinic Access Law, is directed toward a defined group of persons and organizations. Specifically, it prohibits Operation Rescue: Boston, Pro-Life Action Network of Arlington, 38 specifically named individuals, "and those persons in active concert or participation with them who receive actual notice of this Order" from engaging in certain specified actions.

As a practical matter, every blockade or invasion of a clinic that has occurred in Massachusetts in the four years since the first injunction issued has implicated the injunction because Operation Rescue and one or more of the named defendants were involved, thus subjecting all those acting in concert with them to the injunction. (Notably, however, the individual charged in the December 30, 1994, shootings at two Brookline clinics may not be subject to the injunction because he is not named in the injunction and has not been charged with acting in concert with any defendant named in the injunction.) Thus, an important distinction between the injunction and the Clinic Access Law is that a named defendant must be identified as participating in the prohibited action in order to subject all participants to the API.

In all other respects, the API is no different from a criminal statute. Violations of the API are a criminal offense, punishable by up to two and a half years in a house of correction, or a five thousand dollar fine, or both. G.L. c. 12, § 11J. The API is permanent and, therefore, remains in effect until such time, if ever, that it is terminated by a court. The enactment of the Clinic Access Law has no impact on the validity or enforceability of the API.

1. Prohibited Conduct

Although limited to "facilities that provide abortion counseling and services," the Amended Permanent Injunction is broader in its scope of prohibited conduct than the Clinic Access Law. It prohibits:

a. trespassing on, blocking or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counselling or services; or

b. physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at or seeking to obtain services from any facility in the Commonwealth which provides abortion counselling or services; or

c. directing, instructing, conspiring with and/or aiding or abetting directly or indirectly any person, persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b) above.

Most notably, the API covers physical assaults and restraint of clinic patients and staff. Moreover, paragraph (c) provides an important tool that applies to directors and leaders of clinic blockades. Typically, clinic invasions and blockades are highly organized, carefully orchestrated events in which the leaders themselves frequently are not involved in the blockade or invasion, but are on the outskirts holding the keys, issuing instructions, and organizing reinforcements to replace those who have been removed by police. Paragraph (c) is primarily directed at these individuals.

2. Notice

The API, like the Clinic Access Law, requires that defendants receive actual notice of the order, defined in the API to mean "orally or by receipt of a copy thereof."

As a practical matter, most, if not all, of the named parties to the API, as well as numerous others, have received in-hand notice of the API through the efforts of the Office of the Attorney General. Once they have received notice, it is effective for all time. Records of this service are obtainable through the Office of the Attorney General.

At the same time, as discussed below, it is advisable that, prior to arrest, each person specifically be given notice and ordered to leave, and given the opportunity to leave, in order to ensure full compliance with notice requirements.

3. Elements of Proof

In order to prove a violation of the API, it must be demonstrated that: (1) there was a clear outstanding order of the court that was in effect at the time of the incident; (2) the defendant knew of the order; and (3) the defendant wilfully and intentionally disobeyed the order in circumstances in which he was able to obey it. *See* *Commonwealth* v. *Brogan*, 415 Mass. 169 (1993); *Commonwealth* v. *Cotter*, 415 Mass. 183 (1993) (upholding criminal contempt convictions of persons who violated the preliminary injunction and discussing elements of proof for violation of the injunction).

Model jury instructions and other information concerning the elements of proof of violation of the API are available from the Office of the Attorney General.

II. ENFORCEMENT

Over the past several years, Massachusetts police departments have dealt extensively, and very successfully, with enforcement requirements under the API. Notwithstanding the recent tragedy in Brookline, they have also successfully dealt with the tactical and public safety challenges posed by massive and complex blockades of clinics, often involving the use of sophisticated locks, modified vehicles, and other equipment designed to make it maximally difficult for police to restore physical access to clinics.

For the most part, these lessons, techniques, and requirements apply with equal force under the Clinic Access Law. Therefore, the suggestions provided below differ minimally from the suggestions this Office has developed in conjunction with police departments over the past three years.

A. Advance Preparation

Police departments in several cities and towns in the Commonwealth (including Brookline, Boston, and Shrewsbury) have developed detailed plans and procedures for responding to clinic blockades and invasions. Videotapes and training materials from around the country also are available through the Office of the Attorney General. Departments wishing to review or adopt similar policies should contact these departments or this office.

Whether or not a formal plan is adopted, departments anticipating clinic blockades or invasions of medical facilities should have available the following:

1. Multiple copies of the Amended Permanent Injunction (appended hereto, and also available from the Office of the Attorney General);

2. Videotape and photography equipment;

3. Drills and other equipment for removing kryptonite bicycle locks (consult with Boston, Brookline, or Hyannis Police Departments).

B. Pre-Arrest Procedures

The right of arrest is specifically established by statute. See G.L. c. 266, § 120E (violators "may be arrested by a sheriff, deputy sheriff, constable or police officer"); G.L. c. 12, § 11J ("[w]henever any law enforcement officer has probable cause to believe that such defendant has violated the [API], such officer shall have authority to arrest said defendant").

Prior to making arrests for violation of the Clinic Access Law or the API, it is suggested that departments follow the following steps:

1. Attempt to identify persons at the scene who are named in the API, or who appear to be assuming a leadership role. (The Office of the Attorney General will provide copies of prior booking photos of persons named in the API). Try to determine whether there are individuals who are directing others to engage in the blockade or invasion.

2. Use bullhorns to advise participants to refrain from further obstruction or interference in violation of the Clinic Access Law (G.L. c. 266, § 120E), and read the API, if applicable. Read <u>entire</u> API. Record reading by videotape.

3. Hand copy of API to each person who is obstructing access or otherwise violating terms of the injunction or the Clinic Access Law. If individuals will not accept service, place copy on body or in clothing (e.g., pocket). Record by videotape, photographs.

4. Order blockaders/invaders/obstructors to leave, and provide opportunity to leave. (If locks must be removed, provide additional brief opportunity to leave after removing locks.) Record by videotape.

5. Immediately prior to arrest, remind each obstructor individually of terms of Clinic Access Law, and of the API, and that failure to comply will result in arrest. Place under arrest. Record this by videotape.

C. **<u>Arrests</u>**

1. Arrests should be for violation of: (1) G.L. c. 266, § 120E (Clinic Access Law); (2) G.L. c. 12, § 11J (violation of October 28, 1991, Amended Permanent Injunction issued pursuant to Massachusetts Civil Rights Act, Middlesex Superior Court, C.A. No. 89-2487-F, pleading no. 320) <u>and</u> (3) if appropriate, for any other applicable offense (e.g., trespass, disorderly person, A&B, A&B on police officer, etc.) We strongly recommend charging all violations that apply.

2. Notify District Attorney's office of arrests.

3. Notify Office of the Attorney General on the same or next business day by calling: AAG Jane Tewksbury/Freda Fishman, (617) 727-2200.

4. Notify U.S. Attorney's office of arrests.

D. **Proof**

1. Take photographs of all blockades and blockaders/obstructors whenever possible. Attempt to get clear frontal photographs of perpetrators. Video cameras with sound will also provide proof of notice through bullhorns.

2. Attempt to make on-site identification of people who are blockading/obstructing access, and who are in photographs.

3. Take booking photographs.

4. Record with as much detail as possible the precise conduct of the individual that constitutes a violation of the Clinic Access Law and/or the API, e.g., sitting in front of the door, chained to door or one another, trespassing, or blocking patients and staff from entering the clinic.

5. Record how each person was notified to refrain from further obstruction or interference (pursuant to the Clinic Access Law) and of the existence of the API, e.g., in hand service, reading of injunction through bullhorn, individual discussion between officer and accused.

III. CONCLUSION

Notwithstanding recent events in Brookline, Massachusetts has an unparalleled record in protecting physical access to medical facilities. These efforts have made Massachusetts a nationwide model in responding to organized blockade activity. These efforts also have taught us important lessons, including: (1) that rights of physical access to facilities can be protected without deterring or chilling First Amendment rights of free expression; (2) that when police officers enforce the law firmly and fairly, the potential for physical violence and confrontation through people "taking the law into their own hands" can be reduced; and (3) that, in the end, the only way to minimize the long-term commitment of public resources to responding to clinic blockades and invasions is to treat these matters as serious violations of law.

The proof of these lessons lies in our success in stopping organized blockade activity. Three years ago, massive blockades, involving hundreds of participants, were a weekly (or more common) phenomenon in this state. They consumed massive public

resources, diverting law enforcement and public safety personnel from other pressing community needs. The sustained enforcement efforts of the past three years have resulted in eighteen people being convicted of criminal contempt of the API and the earlier preliminary injunction. While lawful protest activity has not declined, and while the potential for violence can never be completely eliminated, blockades and invasions of clinics have become rare occurrences that seldom involve more than a handful of participants. Although clinic blockades and invasions persist throughout most of the country, none has occurred in Massachusetts since September, 1992.

The passage of the Clinic Access Law marks an additional step in this enforcement effort. It creates an important supplementary tool for state law enforcement officials, to be utilized in conjunction with the API in the event that future blockades and invasions occur.

The Office of the Attorney General is available to provide additional technical assistance and training to police departments and District Attorneys in the enforcement of the Clinic Access Law and the API. For further information, please call Assistant Attorney General Freda Fishman at (617) 727-2200.

§ 120E. Obstructing entry to or departure from medical facilities; penalties; injunctive relief

As used in this section, the following words shall have the following meanings:—

"Medical facility", any medical office, medical clinic, medical laboratory, or hospital.

"Notice", (i) receipt of or awareness of the contents of a court order prohibiting blocking of a medical facility; (ii) oral request by an authorized representative of a medical facility, or law enforcement official to refrain from obstructing access to a medical facility; or (iii) written posted notice outside the entrance to a medical facility to refrain from obstructing access to a medical facility.

Whoever knowingly obstructs entry to or departure from any medical facility or who enters or remains in any medical facility so as to impede the provision of medical services, after notice to refrain from such obstruction or interference, shall be punished for the first offense by a fine of not more than one thousand dollars or not more than six months in jail or a house of correction or both, and for each subsequent violation of this section by a fine of not less than five hundred dollars and not more than five thousand dollars or not more than two and one-half years in jail or a house of correction or both. These penalties shall be in addition to any penalties imposed for violation of a court order.

A person who knowingly obstructs entry to or departure from such medical facility or who enters or remains in such facility so as to impede the provision of medical services after notice to refrain from such obstruction or interference, may be arrested by a sheriff, deputy sheriff, constable, or police officer.

Any medical facility whose rights to provide services under the provisions of this section have been violated or which has reason to believe that any person or entity is about to engage in conduct proscribed herein may commence a civil action for injunctive and other equitable relief, including the award of compensatory and exemplary damages. Said civil action shall be instituted either in superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business. An aggrieved facility which prevails in an action authorized by this paragraph, in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorney's fees in an amount to be fixed by the court.

Nothing herein shall be construed to interfere with any rights provided by chapter one hundred and fifty A or by the federal Labor-Management Act of 1947 or other rights to engage in peaceful picketing which does not obstruct entry or departure.

Added by St.1993, c. 218.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 89-2487-F

320

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC., et al.,
Plaintiffs,
BARRY ADLER, D/B/A GYNECARE,
Plaintiff-Intervenor,

and

COMMONWEALTH OF MASSACHUSETTS
by its ATTORNEY GENERAL
Plaintiff-Intervenor,

vs.

OPERATION RESCUE, et al.
Defendants.

AMENDED PERMANENT INJUNCTION

Middlesex, ss.

Commonwealth of Massachusetts
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

In testimony that the foregoing is a true copy on file and of record made by photographic process, I hereunto set my hand and affix the seal of said Superior Court, this twenty-eighth day of October 19 91.

Assistant Clerk

The defendants Operation Rescue: Boston, Pro Life Action Network of Arlington, Barbara Bell, Timothy Biggins, Kevin Blake, Timothy Brigham, Sean Brogan, Rachel Cann, Shirley Clifton, Sean Corrigan, William Cotter, Claire Croghan, Robert Delery, Denise Duda, James Dudley, Robert Filos, Darroline Firlit, Francis Haggerty, Bruce Hendon, Lawrence Howe, Mary Kelliher, Michelle LaPlume, Joseph Manning, Peter Marleau, Jean Marshall, John D. McCarthy, Jr., Richard McCarthy, Anne McNamara, Bruce Murch, Adeline Murray, James Myette, Mortimer O'Shea, Andrew Olsson, Brian Phaneuf, Fred Pulsifer, Philip St. Jean, Russell Saulnier, Andrew Singer Jr., Robert Souza and Catherine Wommack, their officers, agents, servants, employees and those persons in active concert or participation with them who receive actual notice of this Order, either orally or by receipt of a copy thereof, are permanently enjoined, individually and collectively, from:

a. trespassing on, blocking or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counselling or services; or

b. physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at or seeking to obtain services from any facility in the Commonwealth which provides abortion counselling or services; or

c. directing, instructing, conspiring with and/or aiding or abetting directly or indirectly any person, persons, groups or organizations who engage in any of the acts described in paragraphs (a) and (b) above.

Pursuant to General Laws c. 12, §§11H and 11J, VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE;

Peter M. Lauriat
Justice of the Superior Court

Dated: October 28, 1991.

United States Code, Title 18

248. Freedom of access to clinic entrances

a) Prohibited activities. Whoever—

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. Whoever violates this section shall—

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. (1) Right of action. (A) In general. Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States. (A) In general. If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent—

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State attorneys general. (A) In general. If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. Nothing in this section shall be construed—

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. As used in this section:

(1) Facility. The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(Added May 26, 1994, P. L. 103-259, § 3, 108 Stat. 694.)

UPDATE ON REPRODUCTIVE HEALTH CARE CLINIC SECURITY

Central Security Contact

The State Police have established a 24-hour, dedicated phone line to receive, record, and maintain all information related to incidents that occur at, or are related to, reproductive health care clinics. Any incidents or threats should be reported immediately to State Police Operations at (508) 820-2121. Reporting an incident, however, does not eliminate the reporting agency's responsibility to continue to investigate or provide other response services.

Victim Assistance Available

The Massachusetts Office for Victim Assistance (MOVA) provides referrals to specialized services for victims of violent crime or those who suffer trauma as result of violent crime. Referrals include individual counselling for primary and secondary victims of crime (such as Post Traumatic Stress Disorder treatment) and community crisis response support services for groups affected by crime other than the immediate victims (for example, witnesses, co-workers, and persons who identify strongly with the primary victims and need support). To request services or further information, call MOVA at (617) 727-5200 and ask for the victim advocate.

NEW RULE IN SEARCH WARRANT CASES

Robert N. Sikellis, Assistant Attorney General,
Narcotics & Special Investigations Division

The Supreme Judicial Court recently decided a case, *Commonwealth* v. *Guaba*, 417 Mass. 746 (1994), which clarified the procedure that police officers must follow when executing a search warrant. The Court there held that police are required to possess a copy of the search warrant in hand at the scene prior to commencing the search.

In *Guaba*, police arrested Jose Guaba with a package of cocaine while he was on his way to make a delivery. Anticipating that a search warrant would be issued, officers proceeded to his apartment to secure the premises. Upon reaching the apartment, they were met by another resident of the apartment. They informed her that Guaba had been arrested and that they were in the process of seeking a search warrant. They did not conduct a search at that time. A short while later, they received a telephone call from the detective who was seeking the warrant informing them that the search warrant had been issued. The police then began searching the apartment. They seized cocaine, cash, and drug paraphernalia. The detective who had called arrived with the warrant while the search was in progress.

In ordering that all the evidence be suppressed, the Supreme Judicial Court ruled that the failure of the police to have the warrant in their possession at the scene prior to beginning the search invalidated the reasonableness of the search. According to the Court, presence of the warrant at the scene prior to the search serves several purposes. First, the search warrant guides the police. It describes which premises may be searched and provides the permissible scope of the search, describing both the particular areas to be searched and items to be seized. Additionally, the presence of the warrant serves to put the occupants whose premises are being searched on notice of the police's authority to search and the reasons for the search.

This new rule marks a departure from the practice which occurs in other states and in the federal system. Most states, and the federal system, have rules which expressly require law enforcement officials to present a copy of the warrant upon the person whose property is searched at the time of the search. Although there is no statute or rule in the Commonwealth expressly requiring presentation of the search warrant at the time of the search, the SJC held article 14 of the Massachusetts Declaration of Rights "implicitly" contains such a requirement.

Also, most other jurisdictions hold that violations of this rule are considered ministerial or technical, and do not require suppression of evidence found at the scene unless the defendant shows legal prejudice or that the noncompliance was in bad faith. The SJC, however, ruled that the absence of a warrant is not merely a technical omission. Rather, it contravenes the fundamental purpose of the statutory and constitutional prohibition against the use of a general warrant. The omission of the warrant from the scene prior to the start of the search, in other words, invalidates the reasonableness of the search. In so ruling, the Court relied, in part, on the fact that our state's constitution "in some circumstances provide[s] more substantive protection to criminal defendants than does the Fourth Amendment to the United States Constitution."

CRIMINAL HISTORY SYSTEMS BOARD

Veronica Madden, General Counsel,
Criminal History Systems Board

The Criminal History Systems Board (hereinafter CHSB) is statutorily charged with the administration of Criminal Offender Record Information (CORI) law and the Criminal Justice Information System (CJIS). The Board is composed of seventeen members representing all of law enforcement and several other interested parties. The members include the Secretary of Public Safety as chair; the Attorney General; the Commissioners of Correction, Youth Services and Probation; the Chairs of the Parole Board and the Sentencing Commission; and representatives of the Massachusetts District Attorneys Association, the Massachusetts Sheriffs Association and the Massachusetts Chiefs of Police Association. Also included are a victim of crime, a private user of CORI, and four persons with experience in personal privacy. The agency has an executive director and a staff of 42 technical and administrative personnel, with an operations room staffed 24 hours, 365 days a year to ensure continuous service, solve internal problems, and assist agencies with use of the system.

CJIS provides computer terminal access to CORI, which can be freely exchanged between law enforcement agencies. Currently, 550 criminal justice agencies have terminal access, and 750 mobile data terminals in police cruisers are directly connected to CJIS. Non-law enforcement agencies can obtain certification to receive access to CORI by a vote of the Board; CORI is disseminated to such agencies and persons primarily through the CHSB. Examples of such certifications are employers of school bus drivers, school personnel, day care workers, and persons who care for or work with the physically or mentally ill, the elderly, the disabled, and children.

Traditionally CJIS, also known to many in law enforcement as LEAPS (Law Enforcement Agencies Processing System), has provided to law enforcement the "hot" files, namely wanted and missing persons and stolen vehicles, both in state and throughout the United States via an interface with the FBI's National Criminal Information Center (NCIC) and National Law Enforcement Telecommunications System. This gives local law enforcement access to warrants throughout the country. In addition, the mainframe computer located at the offices of the CHSB in Boston has resident databases and connects with other systems to provide a wide range of information to the criminal justice user. In the 1980's the Office of the Commissioner of Probation completed automation of its files, creating a Massachusetts criminal record by arraignment with dispositions. This, one of the best disposition files in the country, is transferred with updates nightly to CJIS from the Office of the Commissioner of

Probation providing current, accurate criminal history data on line. A similar link with the Registry of Motor Vehicles allows police officers instantaneous vehicle registration, license, and driver history data.

In 1993, in response to the increase in domestic violence CHSB and the Office of the Commissioner of Probation worked together to create the restraining order file on line. Restraining orders are received by the clerk and entered by Probation into the criminal records file such that a name and date of birth inquiry by a criminal justice user will immediately reveal criminal history and relevant restraining order data on the defendant. A joint effort with the Massachusetts Parole Board has put on line data on current parolees, identifying a subject as a parolee to the police officer. In turn, a message is sent back to Parole that a query has been made on a specific individual, by whom, and when, providing valuable data to the parole officer that might otherwise never be known. Similarly, the Department of Correction and several sheriffs departments that are automated have provided to CJIS inmate custody status data, which is also available on line to all criminal justice users. Most recently the firearms file has been added to CJIS, providing information relating to an individual's possession of a license to carry and/or FID card. This data can be critical to officer safety. This data, readily accessible on every terminal connected to the CJIS system, provides law enforcement a profile of a subject, outlining virtually all prior contacts with the criminal justice system. This knowledge can be very helpful on a domestic call and can assist in officer safety. CHSB is now working with the Trial Courts on the implementation of the new Warrant Management System, bringing automated "paperless" warrants efficiently from the court to the police station.

The CHSB has historically provided certification to allow victims, witnesses, and family members of homicide victims to register to be notified of the release from custody of offenders relevant to their case. In an effort to enhance this role, the CHSB is now automating the thousands of victim certifications to be stored in a separate database accessible by the Department of Correction, the Parole Board, and the local sheriffs departments, so that a query to this file prior to release or a parole hearing will allow the victims to be notified in advance to either prepare psychologically or to make plans for their safety. It is hoped that in the near future, terminals will be placed in each victim/witness advocate's office, so that the advocate can enter relevant data into this file at the conclusion of the trial.

The CHSB continues to try to bring criminal justice the information critical to its mission. By both storing some data and linking to other databases, CJIS is the "hub" for criminal justice information in the Commonwealth. Plans are now being made to accommodate the FBI's planned advancements in criminal justice technology called NCIC 2000, which will allow the transfer of fingerprints and photo images as well. The mission and goal of CJIS is to provide the criminal justice community with the necessary information by means of the best available technology. Questions or comments on any of these initiatives should be directed to CHSB staff at (617) 727-0090.

RECENT CASES

I. SEARCH AND SEIZURE

A. Searches pursuant to Warrant

Controlled buys establish veracity of informant. Commonwealth v. Desper, 419 Mass. 163 (1994)

An affidavit in support of a search warrant relied heavily on information from a confidential informant. The affidavit stated that the CI had been present with the defendants in the past month in an apartment of a four-story townhouse and had seen the defendants sell cocaine. The officer who obtained the warrant also observed the defendants enter the building. Thereafter, the officer and the CI arranged two controlled buys. The affidavit stated that the officer on two occasions observed the CI enter the building and then return with a bag of cocaine. A no-knock warrant was issued, and the police seized 27 bags of cocaine, drug paraphernalia, and a handgun.

The Supreme Judicial Court reversed the Superior Court's suppression of the evidence. The issue was whether the affidavit satisfied the "veracity" prong of Aguilar-Spinelli. The affidavit did not state that the CI had supplied reliable tips in the past, nor did the officer's independent observations of a number of people entering and after a few minutes leaving the building bolster the CI's reliability. The controlled buys, however, were held to be a sufficient indicator of reliability. Although the affidavit did not state that the officer had searched the CI to ensure he was not carrying drugs before he entered the building, the SJC held that it was enough that the officer was experienced in narcotics investigations and that it was unlikely that the CI would have brought narcotics to his meeting with the officer because the CI probably realized that he could be searched.

Seizure of blood sample permissible after probable cause hearing. In re Lavigne, 418 Mass. 831 (1994)

A judge issued a warrant for seizure of a sample of the respondent's blood for blood-typing and DNA testing in the investigation of a 1972 murder. Although the respondent was a prime suspect in the murder, he was neither charged nor the subject of a grand jury investigation. After the blood was extracted, a Superior Court judge denied the respondent's motion to have it returned to him and allowed the Commonwealth's motion to have the blood released for testing.

The Supreme Judicial Court held that the seizure of a blood sample is permissible under G.L. c. 276, § 1, based on common law. The Court held, however, that such a seizure is permissible only if there is probable cause to believe that the person whose blood is sought committed the crime and

if the identity of the source of the blood found at the scene of the crime is relevant to the Commonwealth's investigation. The Court further held that the suspect is entitled to a hearing prior to issuance of the warrant, in which a judge must make findings that the intrusiveness of the seizure is outweighed by the need for the evidence. Because these procedures had not been performed, the court ordered the blood returned to the defendant.

Reasonable concern for safety permits opening hidden container discovered in proper search incident to arrest. Commonwealth v. Clermy, 37 Mass. App. Ct. 774 (1995)

Police officers had a valid warrant to arrest the defendant for a minor traffic violation. During the arrest they conducted a search of the defendant for weapons, then handcuffed him and placed him in the police car. The cruiser did not have a protective screen between the seats, and one of the officers conducted a second search, in which he "felt a hard object near the defendant's groin area. He reached in and retrieved a prescription pill bottle, bearing someone else's name." The officer opened the bottle and found 25 packets of crack cocaine.

The Appeals Court held that, under these circumstances, the officers were entitled to conduct the second search and to open the pill bottle out of a concern for their safety. The court noted that dangerous weapons come in all shapes and sizes, and police officers are not required to gamble with their personal safety.

Observations of marijuana sufficient to obtain search warrant. Commonwealth v. Allard, 37 Mass. App. Ct. 676 (1994)

Acting on a tip from an unnamed citizen, a state trooper went to the defendant's house. From the road, and then when standing behind the house, the trooper observed marijuana plants growing in the garden. The trooper checked with the Board of Probation and learned that defendant had four prior controlled substance convictions.

The Appeals Court held that an affidavit containing this information established probable cause to search defendant's single-family house and the adjoining garden and shed for marijuana and for materials related to marijuana cultivation and distribution. "[I]t is reasonable to infer that, if marihuana is growing on well-kept grounds of a person convicted of multiple drug violations, items relating to its cultivation and its distribution would be found in his house and his shed."

Controlled buy plus corroboration show "veracity" of informant. Commonwealth v. Richardson, 37 Mass. App. Ct. 482 (1994)

This affidavit supporting a search warrant stated that the confidential informant had provided information leading to two arrests for drug offenses and that the detective had observed the CI make a controlled buy of crack cocaine. Immediately prior to executing the warrant, an undercover detective made another controlled buy to confirm that drug sales were ongoing. The Appeals Court held that the affidavit satisfied the "veracity" prong of Aguilar-Spinelli. Although the fact that the CI

had provided information leading to arrests, rather than convictions, was insufficient, the circumstances surrounding the police-supervised controlled buy, corroborated by police verification of criminal activity, demonstrated the CI's veracity sufficiently to support a finding of probable cause.

The defendant also argued that his convictions for both distribution and trafficking in cocaine were duplicative and thus violated his due process rights. The court held, however, that the Legislature intended to punish the distribution of one quantity of a drug separately from the possession with intent to distribute the dealer's remaining "stash." Thus, conviction and sentencing on both of these charges was proper, where the charges were based on distinct quantities of the drugs.

Description of suspect showing first-hand knowledge shows informant's "basis of knowledge." Commonwealth v. Fleming, 37 Mass. App. Ct. 927 (1994)

For purposes of the Aguilar-Spinelli probable cause standard, the "basis of knowledge" prong was satisfied, albeit barely, by a confidential informant's tip concerning the name and description of the suspect, police corroboration of this information, and the CI's statement that the target, a transsexual, was on his/her way to deliver drugs to the CI. The CI's statement of the target's destination implied that the CI had first-hand knowledge.

B. Warrantless Searches and Seizures

Questioning and pat-down of suspect in police station not "arrest." Commonwealth v. Cook, 419 Mass. 192 (1994)

The defendant was among a group of five men who attacked and killed two others outside the Newtowne Court housing project in Cambridge in 1990. After two of the attackers were arrested and brought to Cambridge Police headquarters, defendant arrived, saying that one of arrestees had telephoned him and asked defendant to bail him out. Aware that the men under arrest had not yet been booked or permitted to use the telephone, an officer patted down defendant, seized a knife, and asked defendant to be seated in the lobby. Defendant was not restrained, and the officer left the station to search for the van in which defendant said he had arrived. Soon thereafter the van was seen going the wrong way on a one-way street near the station. A witness identified the two men in the van as participants in the attack. The officer then arrested defendant.

Although the knife seized after the pat down was suppressed, the defendant argued his statements and other evidence seized after the arrest should also have been suppressed. He argued that the arrest took place when he was initially frisked, at which time the police lacked probable cause to arrest

him. The Supreme Judicial Court rejected this claim. Although two other officers at the station admitted that they would not have allowed defendant to leave if he had tried, because they did not communicate their intent to defendant, because he had arrived at the station voluntarily, and because merely approaching the defendant and asking a few questions did not amount to a seizure, in view of all the circumstances, a reasonable person in defendant's shoes would have believed that he was free to leave.

Trooper without probable cause to search vehicle. Commonwealth v. Kimball, 37 Mass. App. Ct. 604 (1994)

A state trooper stopped a Pontiac on Interstate Highway 84 at 11:15 a.m. The trooper believed the car was stolen because he observed that a side window was smashed out and covered by cloth, that there was a hole where the trunk lock should have been, and that the rear license plate was askew and held by only one screw. In addition, the occupants of the vehicle failed to make eye contact with him, and prior to the stop, the passenger ducked out of view for a moment.

After the trooper pulled the car over, the driver of the car produced a valid license and registration. The passenger carried no identification. The occupants were ordered out of the vehicle and the officer initiated a pat and frisk search of their persons. No contraband was found pursuant to that search. The trooper then searched the car, in which he found a jacket belonging to the passenger containing more than 200 grams of cocaine.

The Appeals Court reversed the conviction. The court held that the dilapidated condition did not provide probable cause to stop the vehicle. Nor was there any traffic violation or visible unlawful defect to give the officer cause to inquire further. Even if the original stop had been valid, there were no grounds for subsequently frisking the occupants of the car, and even if the pat-and-frisk had been valid, there was no justification for further searching the automobile.

Accumulation of evidence permits *Terry* stop of companion to target of arrest warrant. Commonwealth v. Wing Ng, 37 Mass. App. Ct. 283 (1994)

The Randolph Police Department obtained a warrant to arrest John Ng for participating in an armed home invasion. A reliable informant subsequently informed INS special agent Goldman that John Ng, his brother Wing Ng, and others were travelling in a silver Subaru, which the informant identified by its Massachusetts license plate number. The informant vaguely described Wing Ng and stated that the Ngs were at a restaurant in Cambridge. Goldman and another INS agent witnessed John Ng and other Asian men and women leave the restaurant and initiated surveillance of the group at another restaurant on Boylston Street in Boston. Randolph and Boston police officers also converged on the location, were shown a photograph of John Ng, and confirmed the presence of John Ng in the restaurant.

When John Ng, three other males, and two women exited the restaurant and seated themselves in the Subaru, a Boston police officer and others went to

the driver's side. Wing Ng, not John Ng, was in the driver's seat. At that point, the officer did not know where John Ng was seated in the car; he had viewed John Ng's photograph for only about ten seconds.

The officer drew the driver out of the car. The man made no threatening moves and identified himself as Wing Ng. The officer placed him face-down on the ground, felt a bulge, lifted Wing Ng's jacket, saw the grip of a semi-automatic handgun, and removed the gun. Wing Ng admitted that he did not have a permit, and he was placed him under arrest.

The Appeals Court acknowledged that the police had the authority, in carrying out the arrest of John Ng, to remove the other occupants from the car and to ask for identification. The court also ruled that the police were entitled to pat frisk the defendant, Wing Ng. While reaffirming that to establish reasonable suspicion to conduct a *Terry* stop "the evidence must be particularized to the individual," the court stated that that standard "may be satisfied by an accumulative process." It was significant that Wing Ng was a companion of John Ng, that Wing Ng was near John Ng in the car at the time of the arrest, and that Wing was "one of an evidently cohesive group that moved with John from place to place and into the car." Evidence of potential dangerousness was also considered important, which included the fact that the crime charged to John Ng was committed by a group and involved the use of guns, that the arrest was made late at night, and that the street was

both dimly lit and crowded with automobile and pedestrian traffic.

II. ADMISSIONS AND CONFESSIONS

Booking question concerning defendant's employment status inadmissible without *Miranda* warnings. Commonwealth v. Woods, 419 Mass. 366 (1995)

The defendant was convicted for distribution of cocaine and distribution within 1,000 feet of a school. During booking at the police station after his arrest, without being given his *Miranda* warnings, defendant was asked a number of routine questions, including his occupation. He said he was an unemployed hairdresser. In closing argument, the prosecutor argued that the defendant's possession of $207 on his person when he was arrested, combined with the fact he was unemployed, supported an inference that he was a drug dealer.

The Supreme Judicial Court discussed what routine booking questions may be asked without giving *Miranda* warnings. The court stated that questions regarding an arrestee's name, address, height, weight, eye color, date of birth, and current age are permissible, but that questions designed to elicit incriminatory statements are not. In

particular, when the arrestee's employment status may prove incriminatory, as in this case, the police must give *Miranda* warnings before asking questions about employment. As another example of an impermissible question, the court cited *Pennsylvania* v. *Muniz*, 496 U.S. 582 (1990), in which the Supreme Court held that police were obligated to give *Miranda* warnings before asking the defendant, who had been arrested for drunk driving, the date of his *6th* birthday. The SJC ultimately did not suppress the incriminating employment statement because the defendant had not properly raised the issue at trial.

The court also held that a police officer, testifying as an expert witness about the general practices of street drug dealers, could not testify that the defendant was involved in a drug sale, although he could testify that what he observed the defendant doing was "consistent with" a drug transaction. Based on the strength of the Commonwealth's case, however, the court held that the error was harmless.

Miranda warnings must mention right to presence of attorney, either retained or appointed, during any interrogation. Commonwealth v. Miranda, 37 Mass. App. Ct. 939 (1994)

A police officer arrested defendant and recited the *Miranda* warnings from memory. The officer told defendant he had the right to an attorney, and "if he couldn't afford an attorney, one would be appointed to him at the cost of the Commonwealth." The defendant's subsequent incriminating statement was introduced at trial, and he was convicted for trafficking in cocaine. The Appeals Court reversed the conviction, holding that the *Miranda* warnings were inadequate because the officer did not say that defendant had the right to the "presence of an attorney, either retained or appointed, during any interrogation."

III. EVIDENCE ISSUES

DNA matching evidence admissible even though not "generally accepted in scientific community." Commonwealth v. Lanigan, 419 Mass. 15 (1994)

Defendant was convicted of rape and indecent sexual assault and battery on three minors. Prior to trial, he had filed a motion requesting exclusion of the tests that matched DNA found on his clothing with DNA found on the clothing of one of the victims. The court granted defendant's request and the Commonwealth lost the appeal. The Appeals Court held that the statistical method used to prove the DNA match (the "product rule") was not generally accepted in the field of population genetics, and it sent the case back to the Superior Court for trial. The Commonwealth then submitted a different, more conservative matching approach (the "ceiling principle"). Based on this different approach, the trial judge ruled the DNA tests admissible.

The use of expert testimony in Massachusetts has been dictated by the Frye test, which admits such evidence only if "the community of scientists involved generally accepts the theory or process." In Daubert v. Merrell Dow Pharmaceuticals, Inc., however, the U.S. Supreme Court held that admissibility of expert testimony should not be restricted to this one factor but should take other

elements into consideration. The main consideration is whether the evidence is reliable enough to help the jury understand the evidence.

The Supreme Judicial Court elected to follow the Supreme Court's lead. As a result, Massachusetts courts can now consider the following factors when determining whether to admit an expert witnesses's opinion as to scientific or technical evidence: (1) general acceptance by the scientific community (the old Frye standard); (2) whether the theory or technique can or has been tested; and (3) peer review and publication of the theory. On this basis, the SJC held that the "ceiling principle," though too new to be "generally accepted," was nonetheless reliable enough to be admitted.

The court also rejected defendant's claim that the 53-month delay while the DNA issue was decided violated his right to a speedy trial.

Clerk-magistrate convicted for assault and battery. Commonwealth v. O'Neil, 418 Mass. 760 (1994).

Visiting District Court judge James O'Neill was assigned to the second session of the Plymouth District Court. He sent his court officer to ask Roger O'Neil, the clerk-magistrate, to start the second session's proceedings or assign another clerk to do so. O'Neil refused to serve as clerk because he had numerous clerk's hearings to conduct. Judge O'Neill then had the court officer return to O'Neil to tell him that if he did not assign another clerk to the second session the officer would bring him forcibly before the judge. O'Neil again refused, saying his clerks had too much work to do. Judge O'Neill then ordered the court officer to bring O'Neil to the second session, and to "get whoever [he] needed . . . to assist" him.

The court officer asked a Kingston police officer and another court officer for help. The three officers confronted O'Neil and again asked him to go to the second session. O'Neil again refused and they exchanged words. One of the officers gestured toward O'Neil with his hand, and O'Neil grabbed him and knocked him to the ground. O'Neil kicked and punched the officer and pulled out some of his hair.

The Appeals Court affirmed O'Neil's conviction for assault and battery. The court rejected O'Neil's self-defense argument. The injured court officer had been acting under the judge's order to bring O'Neil forcibly before the court. Even if the officer's action was not authorized, O'Neil's use of force was unlawful because he provoked the assault. Moreover, there was no evidence that O'Neil could reasonably have believed that he was in imminent danger of physical harm.

The court also held that O'Neil did not have judicial immunity for his assault on the court officer. Judicial immunity, traditionally accorded to judges who must be able to act freely without threat

of lawsuits, may extend in some circumstances to "quasi-judicial" officers whose duties are an integral part of the judicial process. O'Neil did not have judicial immunity for his assault on the court officer, however, because the attack was not part of any judicial or ministerial duty. While clerks may have immunity where they act under the direction of a judge, O'Neil was acting in direct violation of the judge's order to perform his statutory duties.

Presence in getaway car not enough for conviction as joint venturer. Commonwealth v. Ahart, 37 Mass. App. Ct. 565 (1994)

Rolando Carr was convicted of unarmed robbery, G.L. c. 265, § 19, as a joint venturer in a purse snatching committed by defendant Ahart. After Ahart grabbed the victim's purse at 8:30 a.m., witnesses saw him get into an old, large, green car with a cream-colored roof. Two dark-skinned men were seen in the car. Based on several witnesses' statements, police officers broadcast a description of the suspect car. Forty-five minutes later, an officer in a cruiser noticed the suspect car and pursued it in a short, high-speed chase. He forced the car to stop and apprehended three men, including Ahart. Carr was the driver.

The Appeals Court held that this evidence was not enough to convict Carr as a joint venturer in the purse snatching, because no one testified to seeing him in the getaway car until 45 minutes after the robbery. Under joint venture principles, mere association with the perpetrator before or after a crime is not enough; the Commonwealth must show that the joint venturer shared the mental state required for the crime and somehow participated by counselling or hiring the principal or by agreeing to stand by at or near the scene to assist in the crime or the escape. The court held that the evidence did not meet this standard.

Evidence sufficient to prove drug distribution. Commonwealth v. Ridge, 37 Mass. App. Ct. 943 (1994)

The defendant took two gym bags containing approximately three pounds of cocaine and various drug paraphernalia from his friend Murphy's kitchen. While driving away from Murphy's home, the defendant threw the two gym bags out of the car window. The defendant told several friends that he took the drugs in order to keep them safe because he feared an impending police raid and that he then discarded the drugs to avoid being caught. The defendant was particularly afraid of police presence in Murphy's neighborhood because when defendant had previously tried to steal drugs from a boat, he thought the F.B.I. had chased him from the area. The testimony at trial also revealed that the defendant had threatened Murphy for cooperating with the police during their investigation of the defendant.

The Appeals Court held that there was sufficient evidence to find the defendant guilty of drug distribution. In addition, the court held that evidence of the defendant's prior "bad act," the attempt to burglarize the boat, was properly admitted to show defendant's state of mind and motive, and that the admission of the defendant's threatening statements was permissible to show consciousness of guilt.

Fingerprint evidence not enough to prove identity. Commonwealth v. Estremera, 37 Mass. App. Ct. 923 (1994)

The defendant was found guilty of possession of a stolen motor vehicle on the sole basis of several latent fingerprints that were found on the subsequently abandoned car. The Appeals Court reversed the conviction on the ground that there was no evidence that the defendant had done anything more than touch the car at some point in time. The fingerprints alone were not enough to submit the case to the jury. To convict, there must be evidence showing that the fingerprints were placed at the scene during the commission of the crime; the Commonwealth bears the burden of rebutting the possibility that the fingerprints were placed at the scene at a time other than during the commission of the crime.

IV. CRIMINAL STATUTES INTERPRETED

Without evidence of imminent and serious threats of bodily harm, warrantless arrest for "abuse" under G.L. c. 209A prohibited. Commonwealth v. Jacobsen, 419 Mass. 269 (1995)

Barnstable police were dispatched to defendant's home and spoke to his girlfriend. As a result of this conversation, police arrested defendant without a warrant and charged him with threatening to commit a crime of domestic violence under G.L. c. 275, § 2. Because no protective orders were in effect, defendant was not charged with a violation of c. 209A.

The Supreme Judicial Court held that the arrest was invalid. The arrest was not proper under G.L. c. 275, §§ 2-3, which requires the sworn testimony of the complainant as to the alleged threats, a judicial finding of "just cause" to fear that a crime would be committed, and a warrant--none of which was present in this case.

Although G.L. c. 209A, § 6(7), permits a warrantless arrest when an officer believes a person has committed a misdemeanor involving "abuse," the Court found the statute did not apply. "Abuse," as defined in chapter 209A, includes placing another in fear of imminent serious physical harm (as well as attempting to cause or causing physical harm or causing another to engage in sexual relations by force or threats). Thus, where an officer observes or has probable cause to believe a person has threatened physical harm, and where the threat is "imminent" and "serious" and amounts to an assault, it would be appropriate to make a warrantless arrest and subsequently file a complaint for assault under G.L. c. 265, § 13A, where no restraining order is in place. There was no such evidence on the record.

Although the arrest was illegal, the Court held that the Commonwealth could

still try the defendant on the original complaint or under a new complaint for assault.

Probation Department's records of dismissed criminal complaints to be sealed, not expunged. Commonwealth v. Balboni, 419 Mass. 42

To preserve confidentiality of criminal records maintained by the Department of Probation, defendants may have the records sealed under the "sealing statute," but they may not have them expunged, or destroyed.

The East Boston District Court issued a complaint against the defendant, a corrections officer at the Deer Island House of Correction, based on an inmate's allegation of assault and battery. At the inmate's request, the court dismissed the complaint. The court then granted the officer's motion to expunge the record of the criminal complaint. In response to the court order, the Department of Probation sealed, but did not expunge, the record, based on the Department's interpretation of G. L. c. 276, §§ 100A-100C, which provides for confidentiality by sealing records, but not by expunging them.

Some time later, the Department brought a motion to vacate the expungement order. The Supreme Judicial Court acknowledged that the sealing statute governs the confidentiality of criminal records in these circumstances. In an earlier case, *Police Commissioner of Boston* v. *Municipal Court of the Dorchester District*, 374 Mass. 640 (1978), the Court had stated that the police department's power to expunge records was based on the absence of legislation governing confidentiality of their records. The Court indicated in *Balboni*, however, that the sealing statute explicitly provided for sealing, but not expungement, of the records held by the Department of Probation. Therefore, the District Court should not have granted the motion to expunge. (Nevertheless, because of the delay in bringing the motion to vacate the order, the court held that the Department's motion could not be granted, and so, in compliance with the court order, the records in the particular case were to be expunged.)

Two harassing phone calls constitute a violation. Commonwealth v. Wotan, 37 Mass. App. Ct. 727 (1994)

The Appeals Court held that for the purposes of G.L. c. 269, § 14A, which makes it a misdemeanor to telephone someone "repeatedly" solely to harass, annoy, or molest, the Commonwealth needs to prove only two such telephone calls. By contrast, for purposes of the "stalking statute," G.L. c. 265, § 43, because of the way the word "repeatedly" is used it means more than two incidents.

Interpreter not "witness" within meaning of statute. Commonwealth v. Belite, 37 Mass. App. Ct. 424 (1994)

The defendant attempted to persuade a court-appointed interpreter from appearing in court on his matter by offering him money on at least one occasion. After being notified of the defendant's actions, the Middlesex District Attorney's Office sought a criminal complaint for a violation of Chapter 268, § 13B, which reads in pertinent part: "whoever, directly or indirectly, willfully endeavors by means

of a gift, offer a promise of anything of value . . . to influence . . . or otherwise interfere with any witness . . . shall be punished" (emphasis added).

The defendant argued that the interpreter was not a "witness" within the meaning of the statute, and the Appeals Court agreed. A "witness," as defined by Black's Law Dictionary, is one who sees, hears, or otherwise perceives something about which he or she is called upon to testify under oath and which is recorded as evidence. An interpreter is not covered by this definition. The court indicated that the legislature could have created a statute that would have punished actions resulting in the interference with the administration of justice, but chose not to do so when it wrote the word "witness" into the statute.

Intoxicated person asleep in driver's seat of parked car with engine running "operated" vehicle within meaning of G.L. c. 90, § 24. Commonwealth v. Sudderth, 37 Mass. App. Ct. 317 (1994)

Police officers found defendant asleep in a reclined position in the driver's seat of a stationary car that was legally parked on a public way. The key was in the ignition and the engine was running. Several empty beer cans were found in and around the car, the defendant smelled strongly of alcohol, and after the officers woke defendant and attempted to arrest him, he struggled and used profanity. Defendant subsequently appealed his conviction for operating under the influence contending that the evidence was insufficient both with respect to whether he "operated" a motor vehicle and whether he was "under the influence" at the time. The Appeals Court upheld the conviction.

The court noted that a reasonable inference could be drawn that the defendant intentionally started the engine from his being seated in the driver's seat with the engine running and a key in the ignition. It is also reasonable to infer that he fell asleep while the engine was running and when he was under the influence of alcohol. The court held it unnecessary to prove that defendant actually drove the vehicle, just that he had a diminished capacity to do so. The beer cans, the smell of alcohol, and defendant's conduct were enough to show diminished capacity due to intoxication.

Extraterritorial pursuit based on observations of crime by fellow officer. Commonwealth v. Zirpolo, 37 Mass. App. Ct. 307 (1994)

A Framingham police officer observed the defendant in an intoxicated state in the parking lot of a Framingham bar. Upon seeing the defendant striking another parked car with his vehicle and leaving the parking lot at a high rate of speed, the officer radioed another Framingham officer who was in the vicinity to give chase to the defendant. This second officer arrested the defendant -- on charges of OUI, negligent operation, and leaving the

scene of an accident -- just over the Framingham border in Natick.

The defendant contested the charges on the ground that the second officer had made an improper extraterritorial warrantless arrest. He asserted that G.L. c. 41, § 98A, which authorizes extraterritorial "fresh pursuit" arrests, requires that the predicate arrestable offense must have actually been "in the presence of the arresting officer."

The Appeals Court held that when the arrestable offense is committed in a fellow officer's presence and the arresting officer is jointly participating in the efforts to apprehend the suspect, an extraterritorial arrest under G.L. c. 41, § 98A, is proper. The court applied the "constructive knowledge" doctrine, which holds that officers may base probable cause to arrest upon the knowledge of other officers.

V. CRIMINAL PROCEDURE

Dismissal of charges against wife for shooting husband not in "interests of justice" even when couple had reconciled. Commonwealth v. Thurston, 419 Mass. 101 (1995)

The Thurstons had been married for over thirty years. During this period, the defendant, Mrs. Thurston, had experienced physical abuse at the hands of her husband and also suspected him of adultery. On September 7, 1990, while her husband was shaving, Mrs. Thurston entered the bathroom and emptied a .25 caliber handgun into him. When the police arrived, Mrs. Thurston explained what she had done. After she was arrested and read her *Miranda* rights, she made further statements to the police. She was charged with armed assault with intent to murder.

Mr. Thurston, who survived the bullet wounds, gave a statement to the police, but refused to testify before the grand jury, invoking his marital privilege. The grand jury voted to indict even without the husband's testimony. A Superior Court judge continued the case without a finding and placed defendant on probation for two years.

At the end of the two-year period, over the Commonwealth's opposition, the judge dismissed the case based on her opinion that the Commonwealth would not be able to prove the case without the testimony of Mr. Thurston, who had reconciled with his wife and refused to testify, and that because the two had reconciled it would not be in the interests of justice to prosecute Mrs. Thurston.

The Supreme Judicial Court reversed the dismissal of the indictments. A judge may not dismiss a case over the objection of the Commonwealth unless it is in the "interests of public justice." The court found that the interests of justice would not be served in this case by a dismissal. The evidence that the Commonwealth had against Mrs. Thurston, which included physical evidence and her statements, provided a prima facie case; therefore, the judge was not in the position to dismiss the case for lack of evidence. The fact that the couple had reconciled did not rise to the level of requiring a dismissal in the "interests of public justice."

Juvenile charged with murder has absolute right to an indictment proceeding. Commonwealth v. Perry P., 418 Mass. 808 (1994)

At the close of the Commonwealth's case in a trial on a complaint alleging murder, the juvenile moved to dismiss on the ground that he had not waived his right, under G.L. c. 119, § 61, to an indictment proceeding. After a hearing, the judge declared the trial a "nullity."

The Supreme Judicial Court found that the juvenile was entitled to an indictment proceeding under the statute, and that he had not waived that right even though he did not raise the issue until the close of the Commonwealth's case. The court further held that the declaration of nullity was equivalent to a mistrial and that principles of double jeopardy would not prevent the Commonwealth from trying the juvenile on an indictment for murder.

Special sheriff assumes sheriff's duties during temporary suspension. The Governor v. McGonigle, 418 Mass. 558 (1994)

Middlesex County Sheriff John P. McGonigle was indicted on federal charges of corruption in office. Although indictment alone would not create sufficient cause to remove the sheriff, the Supreme Judicial Court suspended the sheriff while the charges were pending, holding that it would be inappropriate for the sheriff to carry out his duties in the criminal justice system while under indictment. The court further held that because the suspension did not amount to a "removal" and did not therefore create a vacancy, the governor did not have the authority under G.L. c. 54, § 142, to appoint a successor. Rather, under G.L. c. 37, § 5, the "special sheriff," Anthony Sasso, is to perform the sheriff's duties during the temporary absence of the sheriff.

OUI's rights to bail hearing and independent medical examination not violated. Commonwealth v. Whitcomb, 37 Mass. App. Ct. 929 (1994)

The defendant was arrested and charged with operating a motor vehicle while under the influence of alcohol. He was transported to the police station, advised of his *Miranda* rights, and of his rights to use the telephone, to a breathalyzer test, and to an independent medical examination. He did nothing to exercise these rights, was uncooperative, and was finally placed in a cell from 3:00 a.m. to 8:30 a.m. without the booking procedures completed.

The defendant claimed that the charges against him should be dismissed because his right to bail and his right to an independent medical examination were violated. The Appeals Court disagreed. Defendant was given an opportunity to use the phone and receive an independent examination and did not exercise those rights. In addition, he was not entitled to a bail hearing until the booking procedures were completed.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The Main office number for all extensions listed below is (617) 727-2200; TTY-(617) 727-4765. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

This publication is available in alternate formats for persons with disabilities. If you would like your copy of Attorney General Scott Harshbarger's Law Enforcement Newsletter in large print, audio-tape or another format, please contact us.

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Law Enforcement Newsletter

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Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

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LAW ENFORCEMENT
NEWSLETTER

June 1995

Letter from the Attorney General:
The Success of True Crime-Fighting Partnerships

To Members of the Law Enforcement & Criminal Justice Community:

I. Introduction

Welcome to the latest edition of the Law Enforcement Newsletter. This issue features important news regarding the new statewide warrant management system, cellular telephone cloning, law enforcement materials and the public records law, deceptive charitable solicitations and proposed changes in state gun laws.

But first, I would like to discuss what I view as exciting, positive developments regarding the federal crime bill, our new "Operation Clean Sweep" program and the expansion of the Safe Neighborhood Initiative in Boston.

II. State and Federal Community Policing Grants

Since the passage of the federal crime bill last fall, dozens of police chiefs, law enforcement officers and local elected officials have urged that state community policing grants be available for use as the local match monies required to win federal crime bill funds under the U.S. Justice Department's various COPS programs.

In March, state Public Safety Secretary Kathleen M. O'Toole and I co-signed a letter to U.S. Attorney General Janet Reno that asked for matching grant flexibility so that police forces throughout the state could take full advantage of the community policing funds available through the federal crime bill.

I'm delighted to report that Joseph E. Brann, director of the Justice Department's Office of Community Policing Services, gave this approach approval in a letter we received in late May.

"Any community that received a state grant and has not already dedicated or earmarked the state funds for a purpose other than matching a COPS grant may use the funds to match the COPS grant without restriction," Brann wrote.

The Justice Department's approval of the use of state community policing grants to meet the federal local match requirement means that police forces throughout the Commonwealth can hire additional police officers through the federal crime bill using far less of their own funds.

In the case of some cities and towns, the use of state community policing grants -- in combination with the federal share of the matching funds -- means that, at least in the short term, no local money will be needed to hire additional police officers.

The Commonwealth awarded $11.2 million in community policing grants to 169 cities and towns in fiscal 1995. Given that 25 percent represents the current local match to obtain federal community policing funds, the Justice Department's decision theoretically allows police forces to use their state grants to leverage an estimated $33 million in federal community policing assistance.

A large share of the credit for this decision should go to U.S. Rep. Joseph Moakley, who aggressively argued on our behalf with the Justice Department. U.S. Attorney Donald Stern also lent his voice to our effort.

In another positive development, the Justice Department also has approved the use of federal crime bill funds to put police cadets through the academy -- a reversal of the preliminary opinion offered by some Justice officials last fall. U.S. Rep. Barney Frank and U.S. Sen. Edward M. Kennedy worked with my office to secure this support from Justice.

The bottomline of these decisions is that we have taken a big step toward securing the 2,300 additional police officers the crime bill offers to Massachusetts for the remainder of this century. That means more cops on the beat in neighborhoods across our state. Our cash-strapped cities and towns have been given the flexibility they need to use less of their own funds and still meet their policing goals.

The bi-partisan promise of the federal crime bill has produced a true crime-fighting partnership that unites local, state and federal law enforcers under the community policing umbrella.

III. Congressional Efforts to Revamp the Crime Bill

Despite the positive developments surrounding the crime bill, I know many of you are concerned with the increasingly partisan discussion in Congress regarding attempts to overhaul this watershed law enforcement legislation.

The House has already passed its revamped bill and the Senate Judiciary Committee is expected to complete it hearings on the Senate's proposed version sometime this summer. Both versions will include different provisions toward the establishment of a law enforcement block grant program.

As chairman of the National Association of Attorneys General Criminal Law Committee, I am monitoring these developments closely. The Senate version, in particular, recognizes the important role states have traditionally played in fighting crime.

The Senate version distributes block grant money to the states for redistribution to local units of government and permits states to retain a portion of that money for use at the state level. From a law enforcement perspective, these provisions are important because they permit states to create and fund innovative statewide and/or multi-jurisdictional programs that local jurisdictions simply cannot provide on their own.

Along with dozens of my colleagues within the National Association of Attorneys General, I am lobbying the Congress to recognize the importance of coordinated statewide crime-fighting efforts and to adopt a crime bill approach that ensures that block grant funds also can be used for the kind of state and local crime prevention programs that work and are recognized as the key to long-term crime reduction.

I am also urging Congress to ease the incredibly stringent requirements that have been placed on states seeking to take advantage of the prison construction grant program that is a key component of the crime bill. As it stands now, the proposed grant program makes only half the money reasonably accessible to virtually all states. To qualify for the other half of the money, states must meet requirements that will be all but impossible for most to fulfill.

I will keep you informed of developments in the debate regarding the block grant and prison construction provisions, as well as other changes that may be wrought in the crime bill as work in Congress progresses.

IV. "Operation Clean Sweep" Debuts in Waltham

In early May, the Attorney General's Office and the Waltham Police wrapped up a three-month undercover investigation into drug dealing that concluded with 28 arrests on a variety of narcotic offenses. Dubbed "Operation Clean Sweep," this state-local partnership was the first of many such crackdowns planned by my office in communities throughout the state.

The Waltham investigation targeted locations with prior incidents of narcotics violations and focused on drug dealers with prior records for drug distribution. What made this effort unique from a law enforcement perspective, is the fact that all 28 of the defendants were indicted in Superior Court prior to the execution of arrest warrants, an approach that insured they would face higher bail requirements following their arrest and mandatory jail sentences upon their conviction.

In addition, 10 motor vehicles were seized by police under the drug forfeiture law, and civil complaints were filed under drug forfeiture and public nuisance laws against three properties where alleged dealers lived and plied their illicit trade.

The Waltham operation was a prototype partnership that I want to repeat as often as possible throughout our Commonwealth. Six undercover State Police assigned to my office worked with Waltham Police to make repeated purchases of cocaine from suspected small-time dealers. The legal expertise of my prosecutors, the experience and resources of the State Police and the local knowledge and commitment of the Waltham Police were brought together as a powerful, united crime-fighting weapon aimed at taking back neighborhoods plagued by the scourge of drugs.

No one expects these kind of law enforcement partnerships to wipe out drug dealing altogether, but we can make it more difficult for criminals to do business and we can give victimized neighborhoods hope for a better quality of life. I urge any law enforcement jurisdiction interested in participating in "Operation Clean Sweep" to contact Assistant Attorney General David Burns, chief of my Narcotics & Special Investigations Division.

V. Expansion of the Safe Neighborhood Initiative

Later this summer, Boston Mayor Thomas M. Menino, Suffolk County District Attorney Ralph Martin, Boston Police Commissioner Paul Evans and I hope to announce the expansion of our highly successful Safe Neighborhood Initiative in Area C-11.

The planned expansion will include St. Mark's Parish in Dorchester and possibly other neighborhoods within our current SNI partnership in Area C-11, an effort that has led to an 18-percent decline in Part I crimes and a 15-percent decline in Part II crimes in neighborhoods in north Dorchester.

SNI began in February, 1993, as an experimental partnership between state and local government and the residents, businessmen and businesswomen of the neighborhood. State prosecutors joined with assistant district attorneys in targeting the hard core repeat offenders plaguing the area, while city officials, Boston Police and community residents worked together to design a program that attacked problems from street level.

From a statistical perspective, SNI has been an unequivocal success highlighted by a 33-percent decrease in homicides, a 29-percent drop in aggravated assaults, a 20-percent decrease in larcenies and a 15-percent drop in auto thefts. Numerous other benefits have followed, including increased funding for community-based business, youth, health and education programs and a concerted effort to rehabilitate abandoned housing stock.

Equally as important, however, is the fact that SNI, by making residents an equal partner in the crime-fighting and crime prevention team, has made a real difference in the quality of neighborhood life. Few public funds and no quick-fix gimmicks were involved. All it took was a broad-based commitment and a lot of hard work by everyone involved.

The planned expansion of SNI represents the first fruits of a highly successful partnership that will be followed by the creation of a new SNI district in Boston later this year. Early this fall, my office will host a statewide conference designed to showcase the SNI program for law enforcement officers, elected officials and civic leaders from urban communities throughout the state who may be interested in replicating the concept in their own neighborhoods.

VI. A Closing Note

Virtually all of the developments I mention above hinge on a central theme: Partnerships. We know that the law and law enforcement alone will not help us meet the challenges confronting our Commonwealth as we approach the 21st century.

We need each other. We need cooperation and flexibility at every level of government. And, we need our constituents, our civic leaders, the ministry, the charitable sector and the private sector to commit to work together with each other and with us to reach our mutual goals.

I look forward to hearing from you with any questions, comments or suggestions you may have regarding the initiatives discussed in this letter and how we can work together to better protect the public.

Sincerely,

Scott Harshbarger

Reform Act establishes various provisions which should aid in the deterrence and detection of fraud. For example, it provides the Department of Transitional Assistance access to information on the warrant management system, as well as a periodic list of prisoners held in the correctional institutions, adult and juvenile, throughout the state. This will aid in stopping persons who are wanted by the law or in custody from collecting benefits, and may also aid in the apprehension of individuals with outstanding warrants. The act also establishes the pilot fingerprinting and ID system to weed out persons who attempt to collect multiple checks under various identities. It also allows access of otherwise privileged records of the Department of Transitional Assistance to the Bureau of Special Investigations and outlines the need for access by the Bureau of Special Investigations to records held by other state agencies such as the Department of Revenue and Department of Industrial Accidents in order to promote the detection and deterrence of fraud. The Bureau of Special Investigations is also mandated by the statute to oversee and maintain a front-end fraud program. Finally, all case managers are instructed to provide summaries, preferably orally and in writing, informing potential recipients of benefits of the laws, regulations, and penalties for the fraudulent procurement of benefits.

A final important element of the Welfare Reform Act creates c. 209D which is the Uniform Interstate Family Support Act. Part of that chapter provides for the rendition of persons charged with failing to provide support.

II. Legislative Amendments

Chapter 318 of the Acts of 1994: Operation of Watercraft While Under the Influence

This act, effective April 11, 1995, amends the criminal provisions relating to the operation of a watercraft found in G.L. c. 90B to bring the punishment for such crimes in line with similar violations relating to the operation of a motor vehicle. For example, the maximum penalty for operating a boat under the influence of alcohol is presently a fine of not more than $500 and/or incarceration for not more than 6 months in the house of correction. Under this act, first time offenders face a penalty of between $100 and $1000 in fines and the possibility of two and one-half years in the house of correction. This act also provides increased penalties for repeat offenders, and the use of alcohol education and rehabilitation counseling, both on an outpatient and inpatient basis, as part of the sentencing structure. The statute also provides procedures for the revocation of both the defendant's license to operate a motor vehicle and the certificate of number for the vessel by the registry of motor vehicles in instances where a person is convicted of operating a watercraft under the influence or if he or she refuses to take a breathalyzer or blood test.

The act also provides increased penalties for the following criminal acts: negligent or reckless operation of a watercraft, operating under the influence and causing serious bodily injury, and reckless or negligent homicide by a vessel.

Chapter 351 of the Acts of 1995: 209A Arrests

Effective April 13, 1995, General Laws c. 276, § 28, is amended to allow police officers to arrest, without a warrant, any person whom they have probable cause to believe has committed a misdemeanor involving abuse pursuant to c. 209A, or has committed an assault and battery in violation of c. 265, § 13A, against a family or household member as that is defined by c. 209A.

Chapter 352 of the Acts of 1994: Procedures for Trial Testimony of Persons Suffering from Mental Retardation

This act, effective April 13, 1995, which repeals c. 278, §16E, and adds c. 233, §23E, relates to alternative procedures available for the taking of testimony from a person suffering from mental retardation. If the court determines, by clear and convincing evidence in a criminal case, that causing a witness with mental retardation to testify in the usual manner would cause the witness to suffer psychological or emotional trauma, or an impairment of the person's cognitive or behavioral functioning, then the alternative procedures outlined in the statute may be employed. These alternative procedures include, but are not limited to, permitting a family member, counselor or friend to sit with the witness while testifying and permitting the witness to testify from a place in the courtroom other than the witness stand.

If the proceeding is criminal or related to a juvenile delinquency matter, the defendant must be present and both the defendant and witness must have a clear view of each other. The statute also provides further guidance relating to the procedures of taking such testimony and presenting it at trial.

III. Changes to the Rules of Procedure

Massachusetts Rules of Criminal Procedure: On March 29, 1995 (effective April 14, 1995), Rules 15(d) and 25(c)(2) were amended, and Rule 30(c)(9) was added to the Rules of Criminal Procedure. These amendments clarify when a defendant is entitled to file a motion requesting the payment of costs and reasonable attorneys fees based on various appellate proceedings instituted by the Commonwealth.

Massachusetts Rules of Appellate Procedure: On March 29, 1995 (effective April 14, 1995), Rules 11(f) and 27.1(e) were amended. The amendment to Rule 11(f) clarifies the procedure by which the Supreme Judicial Court can order direct appellate review, while the amendment to Rule 27.1(e) clarifies the manner in which the Appeals Court can order further appellate review.

BALANCING THE PUBLIC INTEREST IN DISCLOSURE AGAINST THE NEED FOR CONFIDENTIALITY OF CRIMINAL INVESTIGATIONS:
Public Records Requests, Police Logs, and Subpoenas Served on Police Departments

Gregory I. Massing
Assistant Attorney General, Criminal Bureau

As government officials and as an important presence in the community, police and prosecutors have an interest as well as an obligation to provide public access to and information about their activities. The trust and support of the community is essential to law enforcement personnel in carrying out their public duties. At the same time, maintaining confidentiality is often necessary to conduct effective investigations and prosecution of crime. The balance between disclosure and confidentiality is reflected in legislation such as the public records laws, the police log statute, the criminal offender record information (CORI) law, and in the case law discussing these statutes. In addition, these concerns have presented themselves increasingly in another context: when lawyers in civil suits subpoena police and prosecution files. These issues are the subject of two recent Supreme Judicial Court (SJC) decisions, Globe Newspaper Co. v. Police Commissioner of Boston, 419 Mass. 852 (1995), and District Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507 (1995), which provide an occasion to review the obligation to provide public information, and how to do so without jeopardizing law enforcement interests.

Overview: The Public Records Law

Before addressing the recent case law, a review of the process for responding to public records requests is in order. The centerpiece of the legal scheme in this area is the public records law, G.L. c. 66, § 10. Under this familiar statute, any citizen may request, orally or in writing, to inspect and copy "any public record." Public records are broadly defined under G.L. c. 4, § 7, clause Twenty-sixth, to include all documentary and recorded materials made or received by any government agency or employee, subject to several exemptions (discussed in some detail below). The presumption is that requested records are public, and the government agency has the burden "to prove with specificity the exemption which applies" if it is seeking to deny disclosure. G.L. c. 66, § 10(c).

Government agencies must respond to public records requests within ten days, either by making the requested documents available, stating that the documents are exempt from disclosure and will not be made available, or by making some portions of the requested documents available while withholding other sections. (By informal agreement with the requesting party, it may be possible to lengthen this time period if the request is extensive.) If the request is refused, in whole or in part, the agency must specify the exemption or exemptions upon which it relies. An individual whose written request is refused may seek enforcement by the supervisor of public records

and, ultimately, by the courts.

While the general rule is that government documents are public records, law enforcement agencies may have several valid reasons for refusing a public records request. A central reason is that disclosure of certain information may hinder the department's ability to carry out investigations and prosecutions effectively. In addition, there may be obligations not to disclose certain information in law enforcement files, such as CORI, juvenile court records, information regarding sexual assault victims, and medical or psychiatric records.

The concern with the confidentiality necessary for effective law enforcement is codified in Exemption (f) to the definition of public records. Exemption (f), known as the "investigatory exemption," permits law enforcement to withhold "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." As recently enunciated in Globe Newspaper Co., "the exemption aims at 'the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions.'"

Encouraging citizens to come forward and assist law enforcement efforts is a "principal objective" of the investigatory exemption. For that reason, the exemption applies even to closed cases: "[I]f an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. Even materials relating to an inactive investigation may require confidentiality in order to convince citizens that they may safely confide in law enforcement officials." To the extent exempted portions of police records can be separated out, however, the rest of the document must be made available.

Other exemptions include Exemption (c), the "privacy exemption," which protects from disclosure "data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." Recognized privacy interests include disclosures that would result in personal embarrassment and materials that contain intimate details of a highly personal nature. Even if such interests are present, "[w]here the public interest in obtaining information substantially outweighs the seriousness of any invasion of privacy, the private interest

in preventing disclosure must yield to the public interest."

Exemption (a) protects any materials "specifically or by necessary implication exempted from disclosure by statute." Such materials would include CORI, juvenile court records, and other statutorily privileged matters, such as rape counselling records.

A Special Obligation: Daily Police Logs

Another important obligation in the public information arena is the daily police log statute, G.L. c. 41, § 98F. This law requires police departments to keep "a daily log, written in a form that can be easily understood," and to make the entries in the log "available without charge to the public during regular business hours and at all other reasonable times." The daily log is required to contain "in chronological order, all responses to valid complaints received, crimes reported, the names, addresses of persons arrested and the charges against such persons arrested."

The purpose of the statute is to give the public immediate access to the daily activities of the police department. The police log statute does not contemplate a ten-day response time, as does the public records law, but suggests that the log should be readily available. Accordingly, the information required to be kept in the log is quite limited. First, the log must list responses to valid complaints -- for example, "10:00 p.m. Officer X responded to complaint at 1 Y Street." These entries do not have to include the name of the complainant or of the suspect. In fact, because the logs must be accessible to the public, they should not contain the names of victims or witnesses, in order to maintain the incentive for citizens to come forward. Likewise, it may violate the suspects' rights to report their names in this context; thus, the names of suspects should not be listed either.

Second, the log must list the crimes reported -- what crime was reported, and where and when it took place, for example, "6:00 a.m. B & E reported at 2 Main Street." Again, the names of victims, witnesses, and suspects are not required and should not be included. Finally, if an arrest is made, the log must state the name and address of the person arrested and charges against the person. This part of the daily log statute overrides CORI's confidentiality requirement in the case of adult offenders.

Whether the names and addresses of juveniles arrested should appear in the log is an unsettled issue. Because juvenile court proceedings are generally closed to the public, and because of the rehabilitative focus of the juvenile system, an argument exists that juvenile arrests should be recorded in the daily log as "A Juvenile," without giving the address. Some departments even maintain a separate, non-public log of juvenile arrests. On the other hand, no explicit legal requirement forbids logging the names and addresses of juvenile arrestees; moreover, where the arrest is for murder, the policy reasons for not doing so are weak, as these proceedings are open to the public. See G.L. c. 119, § 65. Protocol for logging juvenile arrests should be developed in consultation with the local District Attorney's

office.

The Municipal Police Institute (MPI) has published a useful, practical guide to public records issues entitled, "Police Media Relations," Policy and Procedure No. 300.

Subpoenas of Police Files

Lawyers in civil cases are increasingly relying on law enforcement personnel to do their work for them. They accomplish this by serving a subpoena on a police officer, an assistant district attorney, or on the "keeper of the records" at a police department or D.A.'s office. As with public records requests, before producing files in response to a subpoena, an assessment should be made whether the contents of the files may be privileged.

Subpoenas usually arise in the context of civil suits that are closely related to a criminal investigation or prosecution. For instance, an assault or rape in a hotel or an apartment building may result in a premises liability suit; a murder or motor vehicle homicide case may lead to a wrongful death suit. In such cases, police files might contain evidence that is otherwise unavailable to private litigants, and a subpoena may be the only way to obtain such evidence. Ever increasingly, however, rather than do their own investigation, private lawyers start preparing their cases by going on a fishing expedition in police or prosecutors' files.

Often the parties seeking such files may be viewed sympathetically, for instance, victims of crimes who are now plaintiffs in civil suits. These may be people who have worked closely with police in an investigation, and the desire to help them may be compelling. Or, the interests of the party seeking files may be adverse to the victim. Such factors, as compelling as they may be, should not govern the decision whether or not to assert privileges when a subpoena is served. Rather, police departments or officers receiving subpoenas should focus on whether the information in their files is confidential or privileged, and whether there is an interest, or even a legal requirement, to maintain this confidentiality.

Even a routine police report may contain privileged information. For instance, files will often contain notes or summaries of victim or witness interviews, unsolicited reports from witnesses, or transcripts of 911 tapes. The short-term interest in keeping these communications secret is obvious -- their disclosure may hamper an ongoing investigation or be dangerous to the witness. As discussed above, to encourage citizen participation in future cases, the interest in confidentiality is still

present even after a case is closed.

In addition, police files may routinely include summaries of conversations with assistant district attorneys, for instance, discussing whether there is probable cause to obtain a search or arrest warrant in a given case. These discussions, however, may also be privileged, because they disclose the work product, mental processes, or discretionary decisions of the District Attorney's office.

In short, before responding to a subpoena for police files or reports, consult with a legal officer. If the District Attorney's office has been involved in an investigation, it is important to make them aware of the subpoena -- they may want to assert a privilege for information contained in police files. Likewise, similar or identical interests may exist in the context of public records requests, and the District Attorney's input should be sought. (This is particularly true as to murder investigations, where the files technically belong to the District Attorney.) Since subpoenas generally call for a response in a short period of time, it is usually best to telephone the lawyer on the other side and ask for more time to respond.

Globe Newspaper Co. v. Police Commissioner of Boston,
419 Mass. 852 (1995)

On April 5, 1995, the SJC decided a public records case involving the Carol Stuart murder investigation and the Boston Police Department's subsequent IAD investigation. The SJC made it clear that this was a unique case and unlikely to recur -- nonetheless, the case highlights the risks of disclosing law enforcement materials.

The *Boston Globe* made a public records request for the Boston Police's IAD materials -- which included materials compiled in the criminal investigation, hotline tips, audiotapes, witness interviews, grand jury testimony, as well as IAD interviews with officers. The results of the IAD investigation were published in a 53-page public document, which was written in response to a previously published report by the U.S. Attorney on his criminal investigation of the Boston Police's investigation. The IAD public response discussed much of the information sought by the *Globe* in its public records request. The Department, however, opposed the public records request on the ground that the materials were exempt under the privacy exemption, the investigatory exemption, and CORI. The Superior Court ordered the Police to disclose most of the materials.

The SJC held that the Superior Court properly ordered disclosure of citizen witness statements, police officers' statements to the IAD, and grand jury materials. Although the Court acknowledged that disclosure of citizen witness statements would usually be detrimental to law enforcement by discouraging citizens to come forward, and that such disclosure might under certain circumstances implicate privacy concerns, the SJC held that these concerns were minimal here, where there had already been so much disclosure. As to the police officers' statements, the court said

the privacy and investigatory concerns were minimal, especially where it was known that the IAD investigation was in response to the U.S. Attorney's public statements. Likewise, the SJC affirmed disclosure of the grand jury testimony, stressing that "we do not conclude that whenever there is public disclosure of some information before a grand jury, maintenance of grand jury secrecy is no longer necessary," but because of the extent of the disclosure here, "there is no real remaining secrecy to protect."

The Court did, however, conclude that records of telephone calls to the police homicide hotline were protected investigatory materials. The callers' identities had never been disclosed, and "the interest in keeping this information confidential -- namely, fostering an atmosphere where citizens can feel free to cooperate with police officers -- has not diminished."

Globe Newspaper Co. is unique because of the public airing of the issues concerning the Stuart murder investigation. The case does point out the need to maintain confidentiality, however. Once some disclosure has been made relating to a particular investigation, it will be difficult to maintain the confidentiality in the future.

District Attorney for the Norfolk Dist. v. Flatley,
419 Mass. 507 (1995)

This case, decided February 15, 1995, concerned a subpoena served upon the Norfolk District Attorney for his files concerning a criminal investigation and prosecution of a rape and assault and battery that occurred in an apartment building. The victim sued the owner and manager of her building, who in turn subpoenaed the prosecutor's files in an attempt to find inconsistencies between the victim's statement to the police and her testimony at trial. The case involved fifteen pages of handwritten interview notes that the assistant district attorney had made immediately following his initial interview with the victim.

The District Attorney argued that the notes were exempted from disclosure as the prosecutor's "deliberative" and investigatory materials, and were also covered by a common-law privilege protecting all communications made to prosecutors. The SJC noted that there is no "deliberative" privilege in Massachusetts, but that two old cases (one from 1921 and one from 1872) "not only establish a broad privilege encompassing all communications made to a prosecutor for the purpose of securing law enforcement, but also make the privilege absolute." The Court also noted the existence of the public records law and the investigatory materials exemption, and it remanded the case for the lower court to consider the application of the public records law in this situation.

While the repercussions of the Flatley case are unclear, it does highlight the fact that notes of witness interviews and communications between police and prosecutors may have some degree of privileged status.

Conclusion

Public requests for access to law enforcement files is an active area. Public officials have an obligation to make their activities available to the citizenry -- and compliance with the police log statute is an important way to fulfill this obligation. At the same time, effective law enforcement requires a certain degree of confidentiality, which is recognized in the statutes and the case law.

Furthermore, disclosure of criminal files in response to a subpoena or a public records request, as well as premature or excessive voluntary disclosure, might foreclose any future attempts to retain the confidentiality of such materials. Public statements made by police might also have the same effect; moreover, police are sometimes held to the same ethical standards as prosecutors with respect to comments on pending criminal cases. See Supreme Judicial Court Rule 3:07, Disciplinary Rule 7-107 (Trial Publicity). The recent cases underscore the importance of a dialogue between police and prosecutors' offices to develop procedures for a coordinated response to document requests concerning criminal files.

In addition to his statutory role in enforcing disclosure orders made by the supervisor of public records, the Attorney General is sometimes contacted informally by parties who feel they have been improperly denied access to what they consider "public records." When the controversy relates to police records, this Office may follow up by contacting the appropriate Police Chief, determining the circumstances, and assisting in an informal resolution if possible.

THE WARRANT SYSTEM REFORM LAW

SUMMARY

On December 28, 1994, the Governor signed into law Chapter 247 of the Acts of 1994, an Act Further Regulating the Warrant System. The act, which was fully effective on June 1, 1995, replaced sections 23A, 29, 30, 31, and 32, and repealed section 67 of G.L. c. 276. It also amended G.L. c. 90, § 22, G.L. c. 248, § 26, and G.L. c. 280, § 6.

The act is intended to reform the arrest and default warrant system in Massachusetts by creating an electronic "Warrant Management System," through which instant access to warrant information will be available to courts, police departments, and the Registry of Motor Vehicles. The act also expands the jurisdiction for setting bail on warrants to the court in whose jurisdiction the defendant was arrested as well as the court where the warrant was issued. In addition, the law prohibits those who have outstanding Massachusetts warrants from obtaining, renewing, or reinstating their driver's licenses.

ANSWERS TO COMMONLY ASKED QUESTIONS

1. **What is the Warrant Management System, and why is it needed in the Commonwealth of Massachusetts?**

The Warrant Management System ("WMS") is a centralized, court-based computer system which will compile and track arrest and default warrants throughout the Commonwealth. The WMS will be accessible through the Criminal Justice Information System ("CJIS"), administered by the Criminal History Systems Board (CHSB).

By replacing the antiquated and paper-intensive warrant system currently in place with a centralized, on-line computer system, and requiring that court personnel and law enforcement officers perform mandatory checks of that system, the WMS is designed to enhance public safety by preventing criminals with outstanding warrants from continuing to avoid apprehension, prosecution, and punishment.

2. **How do local law enforcement officials access information on the WMS?**

The law requires all warrants appearing in the WMS to be accessible to law

enforcement and the Registry of Motor Vehicles through the criminal justice information system maintained by the Criminal History Systems Board. The WMS is currently accessible through CJIS.

3. **When does the law require "Mandatory Warrant Checks," and who is required to perform them?**

Prior to releasing any person from custody, the law **requires** police officers, sheriffs, court clerks, judges, and any other person authorized to admit to bail to first check the WMS to see if any warrant is outstanding in the Commonwealth against that person.

4. **Who is required to maintain the WMS, and what information is going to be available on the WMS?**

According to the law, court clerks will be required to enter the following information, to the extent known to the authority requesting the warrant, onto the WMS whenever the court is requested to issue a warrant: the person's name, last known address, date of birth, gender, race, height, weight, hair and eye color, the offense or offenses designated as felonies or misdemeanors, and any known aliases.

The party requesting the warrant shall be responsible for providing to the clerks as much of this information as is known to the requesting party. The law also requires that the name of the police department initially responsible for serving the warrant, i.e., the department in whose jurisdiction the crime occurred, shall also be entered onto the WMS.

NOTE: The act does not alter in any way the standards for issuance or execution of a warrant, nor does the act alter the standards or circumstances for making a warrantless arrest based upon probable cause.

5. **Who is required to update the WMS to reflect recall or removal of warrants previously entered onto the system?**

The act requires the clerk's office, without unnecessary delay, to enter the removal or recall of a warrant into the WMS.

6. **Without a paper warrant system, how do we provide the arrestee the court-issued warrant?**

The act provides that a printed copy of the warrant contained in the WMS shall constitute a "true copy of the warrant" for purposes of providing the arrestee with a copy of the warrant to the extent required by G.L. c. 248, § 26. In addition, the

appearance of the WMS warrant on CJIS constitutes notice and delivery of said warrant to the police department serving the warrant.

7. **Are police officers liable for their actions taken in good faith in reliance on information contained in the WMS?**

No. The act provides that no law enforcement officer who, in the performance of his or her duties, relies in good faith upon information contained in the WMS, shall be liable in any criminal prosecution or civil action for the intentional torts of false arrest, false imprisonment, malicious prosecution or arrest by false pretense.

Under current law, police officers and other public employees may be held personally liable for intentional torts. However, this new law grants immunity for those officers who act in accordance with information on the WMS, and do so in good faith.

This provision is intended to provide at least the same level of protection, and arguably more protection, than is currently afforded to officers executing warrants.

8. **Does the new law expressly authorize certain locations where persons arrested on warrants may be brought?**

Yes. If a person is arrested on a default warrant for a felony or misdemeanor punishable by more than 100 days, the law enforcement officer may bring the person to either the court that issued the warrant, or to the court that has jurisdiction over the place where the person was arrested or is being held. A bail determination will be made at that time.

9. **How does the new law apply to the Registry of Motor Vehicles?**

Simply put, the registrar is not allowed to issue, renew or reinstate the driver's license of any person against whom there is an outstanding arrest or default warrant issued by a court of the Commonwealth.

10. **When does the Warrant Reform Law become effective?**

The WMS was fully operational on June 1, 1995. On that date, law enforcement agencies and local Registry of Motor Vehicle offices throughout the Commonwealth were fully subject to the mandatory warrant check and other requirements of the act, and court clerks were required to enter information into the WMS whenever a court is requested to issue a warrant.

****NOTE:** Warrants issued <u>prior to</u> June 1, 1995, are not available through the WMS, and must be accessed as before.

SEARCH AND SEIZURE ISSUES IN "CLONED" PHONE CASES

David J. Burns, Assistant Attorney General, Chief
Anne P. Powers, Assistant Attorney General
Narcotics & Special Investigations Division

As the cellular telecommunications industry grows, so does the cellular fraud industry. This article addresses search and seizure issues relative to one of the more common methods of cellular fraud: the use of illegally altered cellular phones or "counterfeit fraud". To "clone" a cellular phone, the counterfeiter duplicates the legitimate subscriber's ESN/MIN combination (Electronic Serial Number/Mobile Identification Number), a unique pair of identification numbers used by the cellular carrier to identify and trace the use of the phone for billing purposes. This duplication of numbers results in the subscriber being billed for calls placed by the "cloned" phone.

General Laws c. 166, § 42A, applies to the crime of fraudulently obtaining telecommunication service. To prove a violation of this section, the prosecutor must show that the defendant intended to defraud, by obtaining telecommunications service "by any false representation, false statement, or stratagem, by unauthorized charging to the account of another, ... tampering with any ... equipment or by any other means". Section 42B of Chapter 166 applies to, among other things, possession with the intent to use "any instrument, apparatus, equipment or device which is designed, adapted or which is used to fraudulently obtain telecommunication service."

A police officer may come across a suspected "cloned" cellular phone in numerous circumstances. A typical scenario, for example, is a motor vehicle stop for an unrelated offense, e.g., motor vehicle violation. During the initial encounter and threshold inquiry regarding the purpose of the stop, the officer may observe a cellular phone in the vehicle. A cellular phone is not per se contraband or an item having immediate evidentiary significance, and therefore, in order to withstand judicial scrutiny, the seizure must fall within one of the following categories:

CONSENSUAL SEARCH:

Consensual searches must be free and voluntary. Commonwealth v. Walker, 370 Mass. 548, 555 (1976). Although an officer is not required to explain his or her purpose when asking for consent, knowledge of that purpose is strong evidence that the consent was voluntary. In addition, the officer need not inform the person of the

right to refuse consent. However, if the person is advised of the right to refuse consent and gives consent, those circumstances further help to establish the voluntariness of the consent. If at all possible, the consent should be in writing and witnessed by a third party.

SEARCH INCIDENT TO ARREST:

Chapter 276 of the General Laws prohibits pretextual arrests and therefore, there must be a valid basis for an initial stop. The courts require that the officer act reasonably and in good faith. If the initial stop is based on reasonable suspicion, the officer's observations may provide probable cause for the subsequent arrest and search incident to the arrest. Timing is critical in that the officer must establish probable cause during the threshold inquiry before seizing the phone incident to arrest.

Section 1 of G.L. c. 276 also restricts the officer's authority to conduct a search incident to arrest to seizing fruits, instrumentalities, contraband or other evidence of the crime for which the arrest has been made, or to prevent the destruction or concealment of relevant evidence, or to remove and secure any weapon the suspect might use to resist arrest or effect his or her escape. Commonwealth v. Madera, 402 Mass. 156, 159 (1988); Commonwealth v. Toole, 389 Mass. 159, 161 (1983).

INVENTORY OF VEHICLE:

To avoid the suppression of evidence seized from inside a vehicle as the result of an inventory search, the primary motive for the search must be to perform administrative duties and not to search for evidence. United States v. Pappas, 613 F.2d 324, 330 (1st Cir. 1980). Generally, the contents of any closed container, even if unlocked, must be left undisturbed. The standard police procedure for the warrantless custodial search of closed containers must be in writing and must specify whether and under what circumstances containers will be opened and their contents inventoried. Commonwealth v. Rostad, 410 Mass. 618 (1991). If a police department has such a written procedure and the circumstances permit the inventory of the contents of a closed container, an argument could be made that to inventory a cellular phone properly, the officer has to remove the battery to read the serial number of the phone. If, while doing so, he or she observes telltale signs of cloning, e.g., the label appears to have been tampered with, the screw is missing, etc., then these observations can act as a basis for probable cause to believe that the phone had been cloned.

WARRANTLESS SEIZURE BASED ON SPECIFIC AND ARTICULABLE FACTS:

An officer needs specific and articulable facts to show probable cause to seize a phone. Examples of observations which could form a partial basis for believing there is probable cause to seize a phone include: observing several cellular phones in the vehicle; a charging cord coming from the cigarette lighter (might indicate that the

suspect has a cellular phone); the presence of a portable ESN reader in the vehicle (not normally found in the possession of individuals not employed in the cellular industry); the individual attempts to conceal a cellular phone; or the individual seems nervous. Some examples of specific and articulable facts which establish reasonable suspicion to justify a Terry stop include: knowledge that a crime has been committed, Commonwealth v. Reed, 23 Mass. App. Ct. 294 (1986); furtive gestures and actions, Commonwealth v. Sanchez, 413 Mass. 238 (1992); suspicious behavior, Commonwealth v. Oreto, 20 Mass. App. Ct. 581 (1985); and knowledge peculiar to an officer's training and experience, Commonwealth v. Lewis, 15 Mass. App. Ct. 617 (1983). Conflicting or implausible responses to threshold questions may also form a basis for probable cause to believe a phone has been cloned.

The timing of the officer's questions is critical. Once a person is in a custodial circumstance, Miranda warnings must be given before interrogation.

SEARCH AND SEIZURE PURSUANT TO A WARRANT:

If an officer seizes a phone for further investigation, the principles of Terry apply. In United States v. Place, 462 U.S. 696 (1983), the Supreme Court held that the initial seizure must be reasonable. If police have probable cause to believe that property is contraband or evidence of a crime, it may be seized pending a prompt application for a search warrant. Arkansas v. Sanders, 442 U.S. 696 (1979).

It is important that an officer include in his or her affidavit in support of a search warrant, all facts establishing probable cause to seize the phone. Therefore, all observations made by the officer and all of the suspect's responses to questions put to him or her by the officer should be included, as well as any specialized training the officer has had in the detection of cloned phones.

Once the cellular phone has been seized, the officer should treat the evidence as he or she would any other physical evidence, namely by preserving the chain of custody and integrity of the evidence. For example, the cellular phone should not be turned off. Once the officer has legal possession of the phone, an expert technician should conduct any tests deemed necessary. At trial, the prosecution will have to establish the chain of custody as well as the fact that the evidence was not altered or tampered with in any way.

Even though an officer, when seeking a criminal complaint in district court, need only show that there is probable cause to believe that Chapter 166 has been violated, at trial, the prosecutor will have to prove beyond a reasonable doubt each and every element of G.L. c. 166, Section 42A and/or 42B. Therefore, the officers should conduct a follow-up investigation which should include contacting the cellular carrier(s) to obtain the name and address of the legitimate subscriber, billing records, call detail records, etc. Once the officer has obtained the carrier information, he or she should contact the legitimate subscriber to establish that the defendant had no authority to use the phone number. In addition, it is necessary to review all of the call detail records to determine what calls were made by the legitimate subscriber and what calls were made by the counterfeit user.

This article is meant to be a brief overview of some of the search and seizure issues which might arise in "cloned" phone cases. Please feel free to call the authors of this article by contacting the Office of the Attorney General at (617) 727-2200, if you have any questions or if we can be of any assistance in the investigation and/or prosecution of "cloned" phone cases.

[Liz Katz, former Special Assistant Attorney General, provided legal research for this article].

ATTORNEY GENERAL PURSUES ENFORCEMENT ACTIONS IN DECEPTIVE CHARITABLE SOLICITATION CASES

Elizabeth S. Reinhardt, Assistant Attorney General
Division of Public Charities

The Division of Public Charities carries out the Attorney General's mandate to oversee charities operating or raising funds in the Commonwealth. Under Massachusetts law, membership organizations such as law enforcement associations or unions are charities if they raise money from the public for a charitable purpose.

The Division focuses its efforts in three areas: fostering charity accountability through annual financial reporting which is available for public inspection, ensuring that directors of charity boards correctly carry out their fiduciary duties of due care and loyalty, and preventing fraud in charitable fundraising.

While the vast majority of charitable fundraising campaigns are carried out lawfully, and proceeds donated by the public fund vital work carried out by charities operating in the Commonwealth, problems do occur. When deception is employed in fundraising, the Division takes enforcement action pursuant to G.L. c. 68, §§ 18-35, and c. 93A, to stop fraudulent solicitation activity and remedy past violations.

In May, the Attorney General filed a deceptive charitable solicitation complaint in Suffolk Superior Court against four professional fundraisers, East West Concert Productions, Inc., Southeastern Productions, Inc., Statewide Promotions, and Joseph Moses, alleging they had deceived the public while raising money for three local law enforcement associations, an association of fire chiefs, and a veterans organization.

A fifth defendant, the Police Alliance of Boston, Inc., allegedly failed to monitor fundraising conducted on its behalf and benefited improperly from funds solicited to help the families of police officers slain in the line of duty and other charitable causes.

The lawsuit capped an 18-month investigation of five different fundraising campaigns reaching into 20 Massachusetts cities and towns. According to the complaint filed by the Attorney General's Office, telephone solicitors had deceived members of the public by stating or implying that they were police officers or volunteers, rather than paid fundraisers, and misrepresenting how their donations would be spent.

A consent judgment signed by defendants East West Concert Productions, Inc. and Southeastern Productions, Inc. was filed with the complaint. In it, these fundraisers agreed to pay $43,000 to the Attorney General's Local Consumer Aid Fund for the purpose of funding local consumer groups or educational efforts. East West and Southeastern are also under a permanent injunction prohibiting the deceptive business practices which led to the Attorney General's complaint.

Assurances of Discontinuances signed by the Lynn Police Association, Massachusetts Police Association, New England Association of Fire Chiefs, Inc., and Vietnam Veterans Agent Orange Victims, Inc. were also filed with the clerk of the Suffolk Superior Court in a related action.

Each of these organizations contracted with East West or Southeastern to raise money on its behalf and, the Attorney General concluded after an investigation, each organization failed to adequately oversee the fundraising to ensure that members of the public received accurate information about who was soliciting them and how their donations would be used.

All four organizations agreed to pay restitution to further charitable causes consistent with donor intent: Lynn Police Association ($5,000.00); Massachusetts Police Association, Inc. ($8,000.00); New England Association of Fire Chiefs, Inc. ($7,500.00); and Vietnam Veterans Agent Orange Victims, Inc. ($7,500.00).

There are a number of ways that organizations who engage in charitable fundraising can act to prevent deceptive solicitation problems. These include:

* Becoming familiar with the requirements of G.L. c. 68 (including the § 19 obligation to obtain a certificate from the Division in advance of fundraising and the § 23 requirement that professional fundraisers disclose their paid status at the time of solicitation) before fundraising begins;

* Taking care to select a reputable fundraiser, if one is used, and ensuring that the terms of any fundraising contract or agreement are favorable to the organization;

* Monitoring fundraiser performance, whether paid or volunteer, to ensure that members of the public are accurately informed about who is asking for their donation and how the money will be used; and

* Carrying out donor intent by handling and accounting for donated funds in a responsible way and making sure the money is used for the purpose(s) for which it was given.

The Division of Public Charities has a number of publications available free to organizations who engage in charitable fundraising. To request copies of G.L. c. 68,

the Attorney General's Guide for Charities Who Fundraise from the Public, the Attorney General's 1994 Report on Charitable Fundraising, or a list of other available publications, please call (617) 727-2200, ext. 2116.

CRIMINAL HISTORY SYSTEMS BOARD CLARIFIES RELATIONSHIP BETWEEN CORI AND PRESS RELEASES

Pamela L. Hunt
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Criminal Bureau

The Criminal History Systems Board has recently issued an advisory opinion concerning the application of CORI (Criminal Offender Records Information) law, G.L. c. 6, § 167, et seq., to redistribution of press releases originally issued by prosecutors' offices. The Insurance Fraud Bureau (IFB) had asked if it was prohibited by CORI law from issuing its own press releases containing excerpts and verbatim passages from press releases earlier disseminated by the Attorney General's Office. The Attorney General's press releases had contained the name, address, and criminal offenses of recently sentenced or indicted individuals, and the IFB's own press releases contained the same information.

Counsel to the Criminal History Systems Board has taken the position that CORI that was properly and contemporaneously disseminated to the public in a press release issued by a prosecutor's office at the time of a prosecution, may be disseminated by re-release at any time in the future without violating CORI. In declaring that neither the CORI law itself, nor any regulation of the CHSB, prohibited re-release of the precise information in the Attorney General's press releases, counsel concluded that "[o]nce specific CORI data has been transmitted to the public by a press release that specific information as contained within that press release is no longer restricted. . . . Once reduced to printed form and released to the public the originally exempted CORI can be reproduced at any time."

It is important, however, that the original press release be proper. In this case, the Attorney General's Office, as a criminal justice agency, could release CORI data "specifically related to and contemporaneous with an investigation or prosecution." 803 C.M.R. 2.04(5)(a). In addition, Board counsel concluded that because there are no restrictions on information released if it originated "in the course of criminal [court] proceedings," 803 C.M.R. 2.04(6), if the Attorney General's press release information was based entirely on information made available during such criminal court proceedings "its re-release would be permitted at any time."

The opinion only concerns the application of the CORI law. Merely because re-issuing press releases may not violate CORI does not mean that doing so will not have other legal implications. For example, prosecutors have specific obligations not to create publicity or make public statements which would affect a defendant's ability to receive a fair trial. Police officers and departments involved in a particular case could be viewed as agents of the prosecution and their actions in creating publicity would likely be attributed to the prosecutor and could affect the Commonwealth's ability to prosecute the case. The Attorney General and each of the District Attorneys offices have experienced press personnel who are knowledgeable about the

obligations of prosecutors in the public information area. Police officers should consult with the prosecutor's office before acting to re-issue any press releases in particular cases.

DOMESTIC VIOLENCE UPDATE

Carolyn Keshian, Assistant Attorney General
Amy Maizel Seeherman, Research/Policy Analyst
Family and Community Crimes Bureau

SAVE THE DATE: The Attorney General's annual statewide police training on domestic violence will be held on October 17, 1995, in Burlington. More information on the conference, including registration information, will be available soon.

NEW LEGISLATION

Chapter 24 of the Acts of 1995: The Victim Rights Law of 1995

On August 13, 1995, An Act Relative to Victim Assistance will take effect. This legislation, Chapter 24 of the Acts of 1995, was drafted by the Massachusetts Office for Victim Assistance (MOVA) and the Victim and Witness Assistance Board, chaired by Attorney General Scott Harshbarger. It builds upon the Victim Rights Law enacted by the Commonwealth in 1983, G.L. c. 258B, which established one of the nation's first statewide systems of crime victim assistance.

Although the legislation neither places new obligations upon the police nor changes existing ones, except for officers serving as "police prosecutors" if they are handling cases involving victims, it does affect the responsibilities of virtually all others with a role in the criminal justice system -- prosecutors, victim/witness advocates, judges, probation officers, corrections officials and parole officers.

Included within the act are provisions that will:

-- provide to victims a right to confer with the prosecutor prior to the start of a trial, prior to the dismissal of charges against a defendant, prior to the Commonwealth proposing the prosecution's sentence recommendation to the Court, prior to a hearing on defense motions to obtain the victim's psychiatric or other confidential records, and prior to the filing of a presentence report by the Probation Department (note: this is a right of consultation, not a right to control the proceedings);

-- expand the right of victims to offer victim impact statements at sentencing to include all victims of crimes against the person and crimes where physical injury to a person results (in contrast to the current statute which provides this right only to victims and family members in felony and motor vehicle homicide cases);

-- broaden the categories of information that must be provided to victims, to include, among other types of information, information about restitution orders and other conditions of probation, as well as specific information about the type of sentence imposed; notification if the defendant is moved to a less secure facility; and

specific information about the rights of victims and their role in the criminal justice process.

MOVA is drafting comprehensive guides and brochures for victims to advise them of their rights. This material will be available to police when completed. In addition, the Attorney General's Office, District Attorneys' offices, the courts, and other affected agencies and individuals are currently engaged in developing new procedures to implement the law. You may contact your local District Attorney's victim/witness advocates or MOVA for additional information.

COURT DECISIONS:

On June 15, 1995, the Supreme Judicial Court upheld the constitutionality of G.L. c. 209A in the case of Frizado v. Frizado, 420 Mass. 592 (1995). The defendant had challenged the statute on a number of grounds, including claims that he was being denied his property without due process, that he was entitled to a jury trial, and that he was forced to choose between possibly incriminating himself or defending against the c. 209A complaint. The court rejected all the claims.

LEGISLATION:

No major domestic violence legislation has been enacted since the last edition of the Law Enforcement Newsletter. However, as noted in the last LEN, there is significant pending legislation affecting domestic violence enforcement. Among the bills filed by the Attorney General's Office on which we are urging action is House Bill 4827, which would permit police officers responding to domestic violence incidents to make a warrantless arrest for the offense of threatening to commit a crime when they have probable cause to believe that the victim reasonably fears imminent serious bodily harm. Several other relevant bills filed by the Attorney General are referenced herein. If you are interested in the specifics of any pending domestic violence legislation, or in assisting in securing its passage, please contact Assistant Attorney General Carolyn Keshian at (617) 727-2200.

DOMESTIC VIOLENCE AND FIREARMS:

All too frequently we see tragic examples of the volatile combination of firearms and family violence. The Commonwealth has made great strides in beginning to address this problem by enacting amendments to G.L. c. 209A, which became effective on July 1, 1994, that require a judge issuing an emergency or temporary restraining order to order the defendant to immediately surrender all guns and

ammunition he possesses, as well as any firearms identification card and license to carry he holds, to the appropriate law enforcement officials. Although these important changes to the law are not "new," the Attorney General's Office routinely receives questions regarding these complex provisions from law enforcement officers throughout the Commonwealth. We attempted to answer the most common of these questions in the manual for our last statewide police domestic violence training, held in October, 1994. Because these inquiries continue, and some of the answers are now modified by the new federal Violent Crime Control and Law Enforcement Act of 1994, we are reprinting several of the questions with updated answers here:

A. Relevant Provisions of Federal Law Relating To Firearms

1. One of the provisions in the Violent Crime Control and Law Enforcement Act of 1994 amended the Gun Control Act of 1968 to make it a federal offense for persons subject to certain restraining orders to possess or receive firearms. The new provision makes it unlawful for a person subject to a domestic violence restraining order to receive, ship, transport or possess guns (including handguns, rifles and shotguns) or ammunition that traveled in interstate commerce, if the restraining order meets the following criteria:

a) specifically restrains the person from harassing, stalking, or threatening an "intimate partner";
b) was issued after a hearing of which the person had notice and at which the person had an opportunity to participate; and
c) either includes a finding that the person subject to the order represents a credible threat to the "intimate partner" or child of the "intimate partner," or explicitly prohibits the use, attempted use, or threatened use of force against the partner.

It is apparent that virtually all so-called "permanent" Massachusetts c. 209A orders involving "intimate partners" would meet these criteria, thus rendering it unlawful under federal law for the person subject to them to possess most guns, regardless of whether possession was lawful under state law.

2. The second relevant federal firearms provision is the federal "felon-in-possession of a firearm" law, 18 U.S.C. § 922(g). This law makes it unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess any gun or ammunition. An exception to this section excludes from consideration any conviction for a state offense classified by the state as a misdemeanor and punishable by a term of imprisonment of two years or less. Thus, although an individual may be entitled to issuance of an FID card under state law, it may be unlawful under federal law for that person actually to possess a gun. This gap between federal law and Massachusetts firearms provisions exists only as to misdemeanor offenses punishable by more than two years of imprisonment. However, a defendant with a conviction for an offense such as assault and battery, operating under the influence, or even some operating

after suspension offenses, would be affected. Such an individual could not be denied an FID card under state law, but would be violating federal law if he or she actually possessed a gun that had traveled in interstate commerce. (See, United States v. Indelicato, a case tried in the U.S. District Court in Massachusetts, in which the Court issued a ruling on May 4, 1995, convicting a defendant on exactly these facts, holding that the defendant's lack of knowledge that his gun possession was unlawful under federal law was not a defense, and citing two First Circuit Court of Appeals cases as authority.)

B. Massachusetts Restraining Order/Firearms Law

1. When responding to the scene of a domestic violence incident when no restraining order is in effect, can a police officer conduct a search for weapons when there is reason to believe that there are guns in the home?

This is a complex issue in which the specific facts and circumstances of each case will be highly relevant. There are alternatives, short of conducting a full search, that could result in removing the weapons from the individual or the premises.

For example, a police officer arriving on the scene of a domestic violence incident can request that the defendant voluntarily turn over his guns to the police, to be held temporarily for safe keeping. If the victim and the defendant jointly share the premises, the victim may ask the police to take custody of any guns present, or may consent to a search for weapons and voluntarily relinquish any that are found.

Officers arriving on the scene may also have probable cause to believe that the defendant possesses a firearm unlawfully -- either without a permit of any kind, or possesses unlawful (for example, stolen) guns. In such cases, the officers may use whatever lawful means are available to seize the guns, such as plain view or search incident to arrest. In other circumstances, in order to search for weapons that the police have probable cause to believe the defendant possesses unlawfully, a search warrant must be obtained.

Finally, G.L. c. 209A, § 6, states that whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, the officer shall use all reasonable means to prevent further abuse. While this language does not explicitly authorize a search for weapons, this broad directive may supply some support for a decision to take weapons into temporary custody when police officers believe that they are faced with exigent circumstances and that

such action is necessary to ensure the victim's safety. Cf., Commonwealth v. Rexach, 20 Mass. App. Ct. 919 (1985).

In instances where the defendant refuses to voluntarily surrender his guns, and he holds a license to carry, the Chief of Police who issued the license has the ability and authority to revoke it if the Chief is notified of the surrounding circumstances and determines that they show the defendant is an unsuitable person to possess such a license. If the defendant holds an FID card rather than a license to carry, a record check should be done to determine whether any event has occurred since the defendant initially obtained the FID card that would allow the card to be revoked. However, if a Chief acts to revoke a license to carry or an FID card under G.L. c. 140, § 129D, a defendant who appeals the revocation can retain possession until the case is decided.

As a matter of federal law, as set forth above, if the defendant has been convicted of a misdemeanor punishable by more than two years imprisonment, he is subject to federal prosecution for possession of firearms or ammunition, and notifying federal authorities would be appropriate.

2. When serving a restraining order and suspension and surrender order, how do I immediately take possession of all guns, ammunition and gun permits if the defendant tells me that he does not own a gun, even though I have reason to believe that he does?

Again, police may use all lawful means currently available to take possession of the weapons.

Remember that once the restraining order and suspension and surrender order have been issued, a gun owner is no longer legally in possession of any guns, ammunition or gun permits. If the police have probable cause to believe that the defendant is in possession of weapons in violation of the order, police may conduct a search without a warrant under any of the established exceptions to the warrant requirement -- typically, consent of a co-inhabitant of the dwelling, plain view, or search incident to arrest (if there are independent grounds for arrest).

If none of these exceptions exist, police should seek the issuance of a complaint and arrest warrant, as well as a search warrant. When the defendant is a licensed gun owner whose permit is now suspended, police should be able to obtain a search warrant, because G.L. c. 209A, § 3B, creates a new misdemeanor offense for the violation of the surrender order. (See also, response to Question 4.)

Officers may also want to advise the defendant in these circumstances that it is a federal offense to be in possession of firearms when a domestic violence restraining order is in effect, as set forth in A(1), above.

Where there is probable cause to believe that a defendant possesses guns

unlawfully (that is, without the appropriate license or FID card), or possesses stolen guns, police should seek issuance of a search warrant for the guns initially, before service of the order, rather than relying on the court's order to surrender them, as long as service of the order will not be delayed. This procedure will allow prosecution for illegal gun possession under G.L. c. 269, § 10. (Otherwise, if the defendant surrenders the guns in response to the court's order, this could be considered a compelled surrender of the weapons in violation of the defendant's rights under Article 12 of the Declaration of Rights of the Massachusetts Constitution, in which case the defendant may not be able to be successfully prosecuted for unlawful possession of any guns surrendered.)

3. Can a defendant be arrested without a warrant for a violation of a surrender order?

Under current law, it is our opinion that the answer is "No." The mandatory warrantless arrest provisions in G.L. c. 209A do not appear to apply to a violation of a suspension and surrender order. Therefore, all existing law with regard to arrest applies.

Note that the Draft Standards of Judicial Response for Abuse Prevention Orders recommend that in an emergency, a complaint, arrest warrant and search warrant may be issued by a clerk-magistrate, an assistant clerk- magistrate, or a judge through the Emergency Judicial Response System during non-court hours. While these recommendations were issued prior to the enactment of the Domestic Violence/ Firearms Law, it appears that this procedure could also be utilized under the new law, when there is probable cause to believe that the defendant possesses firearms which are not being surrendered in response to the court's suspension and surrender order.

The Attorney General has filed two bills, Senate Bill No. 919, An Act To Further Protect Victims Of Domestic Violence, and Senate Bill No. 1229, An Act To Regulate Firearms Permits To Promote Public Safety, which each contain amendments that would authorize and require police officers to make an arrest upon probable cause that the defendant possesses firearms but is failing to surrender them upon request after issuance of a suspension and surrender order. If enacted, these amendments would ensure that surrender and suspension orders would be treated exactly the same as all other criminally enforceable provisions of c. 209A protective orders, which call for mandatory arrest of the defendant if the police have probable cause to believe that such a provision of an order has been violated. If this legislation passes, these arrests could then be made without the benefit of a criminal complaint and arrest warrant. These bills each have had legislative hearings and are awaiting

action by the Judiciary and Public Safety Committees.

4. What is the duration of an order for the suspension and surrender of weapons?

The suspension and surrender order lasts for the duration of the restraining order, unless the defendant petitions for review and the court vacates the suspension and surrender order. Once the restraining order expires or is not renewed, the suspension and surrender order is no longer in effect. Keep in mind, however, that in cases in which the defendant has a license to carry, the Chief of Police who issued the license can still look at the underlying conduct to determine whether or not the defendant is a suitable person for a license to carry. It is thus important to ensure that the appropriate licensing authority is notified.

It is also important for the Chief of Police to be aware of the federal law relating to a felon-in- possession of firearms, as set forth in A(2) above. If the defendant has been convicted of a misdemeanor carrying a sentence of more than 2 years, the Chief may return the defendant's firearms permits under these circumstances, but <u>should not</u> return guns to the defendant in the absence of a court order, notwithstanding the validity of his Massachusetts gun permit, because such a defendant would then be in violation of federal law (unless his gun had been manufactured in Massachusetts and never traveled in interstate commerce).

5. What rights do police officers, or others professionals who need to carry a firearm for employment purposes, have once a restraining order is issued against them?

If the defendant files an affidavit that a firearm is necessary for his or her employment and requests an expedited hearing, then the defendant is entitled to judicial review of the suspension and surrender order within 2 court business days of the court's receipt of the affidavit and request. At the review hearing, the court will be determining whether return of the items presents a likelihood of abuse to the plaintiff.

With respect to the federal law on firearms and restraining orders, as set forth in A(1) above, the federal Bureau of Alcohol, Tobacco and Firearms has interpreted the provision of federal law relative to relief from disabilities, 18 U.S.C. § 925 (a)(1), as not prohibiting a federal, state or local law enforcement officer from possessing a service firearm <u>while on duty</u> despite the existence of a domestic violence restraining order against the officer. The federal law would, however, be violated if an officer subject to a restraining order possesses a firearm while off-duty.

6. If police have seized guns under a suspension and surrender order and the underlying restraining order is not pursued, are the police obligated to return the seized weapons if the defendant lawfully possessed the weapons prior to their seizure?

As mentioned in (4) above, in cases where the defendant has a license to carry firearms, it is likely that the Chief of Police who issued it has the discretion to revoke the license based on the conduct underlying the original restraining order under the "suitable person" standard.

Where the defendant has an FID card, police should conduct a criminal records check on the individual, as well as a review of the Domestic Violence Registry, to determine whether other grounds exist that would support denying return of the seized items, keeping in mind the above-referenced federal laws. Police also should check with the victim of the domestic violence incident to determine her level of fear of the defendant and explore options to promote her safety (for example, if she realizes the guns are to be returned, she may feel that maintaining a protective order is appropriate), and, obviously, should obtain confirmation that the order is actually vacated prior to turning over the weapons.

If you have other questions regarding the firearms provisions of G.L. c. 209A, please feel free to contact Assistant Attorney General Diane S. Juliar, Chief of the Family and Community Crimes Bureau, or Assistant Attorney General Carolyn Keshian, at (617) 727-2200.

DOMESTIC VIOLENCE RESEARCH:

The remainder of this column is devoted to a summary of two relevant research articles in the area of domestic violence.

In a Bureau of Justice Statistics Special Report, "Murder in Families," by John M. Dawson and Patrick A. Langan, Ph.D. (July, 1994), the authors reported the results of a large scale survey examining the nature and extent of murder in families. Survey data were compiled from state and county prosecutors' files from a representative sample of all murder cases concluded in the nation's 75 largest counties in 1988. This study reaffirmed the assertion that the majority of murder victims know their assailants. It found that 16% of murder victims were members of the defendant's family; 64% were murdered by friends or acquaintances; and only 20% were murdered by strangers.

Some of the other interesting findings from this study include:

(1) The majority of the non-family murder defendants (93%) and of the family murder defendants (66%) were male.
(2) In murders of marital partners, husbands accounted for approximately 60% of the assailants.
(3) In murders of their children, women represented 55% of the killers.
(4) Over 60% of non-family murders and over 40% of family murders were committed with a firearm.
(5) Among all family murder victims, victims in spousal murders were the most likely to die from a bullet wound (53%).
(6) When children under age 12 are murdered, a family member is the likely perpetrator. In fact, according to the data, family members killed 63% of the child murder victims. A parent was the most likely assailant in these cases (57% of cases).
(7) As expected, the data also revealed that 79% of all murder victims under the age of 12 were abused prior to their death by the perpetrator.
(8) In this sample, over one quarter (27%) of the murder victims over the age of sixty were killed by a family member. The perpetrator was a child of the victim in 42% of these cases and a spouse in 24% of the cases.
(9) Finally, when the study examined the criminal justice system response to family murder, the data revealed that there were no differences in sentencing severity between family and non-family murders.

The findings from this study underscore the importance of early intervention in an effort to prevent violence within families.

Another article, "Focus: Managing Care for Victims of Violence, The Child Witness to Violence Project," by Betsy McAlister Groves, LICSW, (March-April, 1994), reviews some of the increasing evidence about the deleterious effects of violence upon young children who witness it, and describes one local hospital's response.

Research evidence has shown that at least 3.3 million children will witness domestic violence each year (Jaffe et al., 1990). Moreover, clinical professionals working in this area have found that witnessing severe or chronic violence in the home has much more adverse consequences for children than does exposure to violence in the community (Groves, 1993). Children who witness this violence are at increased risk for developing short and long term emotional and behavioral problems.

Data obtained from a questionnaire given to parents in the waiting room at the Pediatric Primary Care Clinic at BCH and interviews of approximately 135 mothers who brought their children to the clinic for primary care indicated that one in ten children at BCH for primary care had witnessed a shooting or stabbing by the age of seven, and half of these incidents occurred in the home. In addition, 18% of the women interviewed had been victims of a stabbing. This data, in addition to the premise that early intervention can reduce the deleterious effects upon children of

exposure to violence, provided the foundation for the creation of the Child Witness to Violence Project at Boston City Hospital.

The Project is a counseling and advocacy program which offers: (1) psychological assessment and counseling services to children who have been affected by violence, and supportive counseling for their families; (2) consultation services to health centers, schools, day care centers and other agencies in the community; and (3) training for professionals who work with children who have witnessed violence, including police officers.

The Project features a very effective collaborative effort between the Boston Police Department and the Project's pediatric mental health professionals. During the past year, staff from the Project have provided training for police in Districts C-11 and C-6 in Boston. In addition, the Project established a mechanism to receive referrals from officers about families they encountered who were impacted by violence and in need of services. The police also utilize the Project staff for consultation about a variety of issues affecting children and families. In sum, the Child Witness to Violence Project is a valuable resource both for children who have been exposed to violence and for those service providers who come into contact with these "silent victims" (Groves et al., 1993). It brings together law enforcement and human services to help break the cycle of violence harming children and their families.

For additional information about either of these articles, contact Amy Maizel Seeherman, Ph.D., at (617) 727-2200.

I. SEARCH AND SEIZURE

A. Searches pursuant to a warrant

Seizure of gun and contraband in apartment lawful even where target of arrest warrant not present. Commonwealth v. Franco, 419 Mass. 635 (1995)

Members of the U.S. Marshall's Office attempted to execute an arrest warrant for a suspect in a Revere apartment. Although the suspect was not there, an individual permitted the officers into the apartment where they smelled a narcotic substance cooking in the kitchen. Due to the strong odor of the substance, the individual's eyes were turning red, and the agents moved him into the living room. There, the individual quickly turned his head, whereupon the agents noticed a gun protruding from under a shelf. Upon removing the gun, the agents found marijuana and cocaine. At that point, the individual was arrested, advised of his Miranda rights, and asked to consent to a search of the apartment, which he did. The Court held that the police could properly stay in the apartment despite the absence of the warrant's target, and that once they moved the defendant into the living room due to his reaction to the odor of the unlawful substance, seizure of the contraband was lawful where the items were in plain view, and there was probable cause to arrest the defendant.

Evidence of possession of heroin with intent to distribute sufficient to support conviction. Commonwealth v. Pichardo, 38 Mass. App. Ct. 416 (1995)

An undercover police officer approached an individual and stated that he "wanted two", after which the individual handed over two packets of what appeared to be heroin. The officer rejected the packets, stating that he wanted crack cocaine, not heroin. The individual called the defendant over and spoke to him in Spanish. The defendant then led the officer into an apartment building, asked him to wait, entered an apartment, returned with a bag of crack cocaine and handed it to the officer in exchange for twenty dollars.

The officer returned a few minutes later with several other officers and a search warrant. The search of the apartment revealed drug packaging paraphernalia in the bedroom and kitchen, and heroin, rock cocaine, powdered cocaine, a digital scale and drug sales records in a hidden compartment in the bedroom closet. The Appeals Court found this evidence sufficient to support defendant's conviction on the heroin charge concluding that access to the "secret stockpile was more than adequate to support an inference of constructive - if not actual - possession of ... the heroin."

Affidavit submitted in support of search warrant insufficient where based on first-time informant and inadequate independent police corroboration of tip. Commonwealth v. Reyes, 38 Mass. App. Ct. 483 (1995)

An unidentified first-time informant provided a tip to the police that a large quantity of cocaine could be found at a particular apartment. The informant stated that two days before, two Colombians had arrived in a white Blazer car with a New York license plate, and the car was parked behind the apartment building. The informant reported that he had personally seen approximately two to three kilograms of cocaine in the apartment, and he had learned that an individual would be leaving that day in the car with a large amount of cash.

The police confirmed that a car matching the informant's description was parked at the rear of the identified apartment building, and a record check showed that the car's owner had a record in New York, but not for drug offenses. Other unnamed sources told the police that the same car had been used to transport large quantities of cocaine to the same area. The affiant police officer stated that he had "personal knowledge" from another unidentified source that the operator of the car had been involved in a large-scale crack cocaine operation in the same town. The affiant further stated that he had received information in the past that the renter of the suspect apartment was a large distributor of cocaine, and he had previously observed the defendant receiving money from a drug deal. Finally, the officer averred that another police officer had information that a different individual had been involved in the distribution of cocaine with the owner of the white Blazer.

The Appeals Court reversed the defendant's conviction, concluding that the affidavit did not contain adequate evidence of the informant's veracity, and the corroboration did not go beyond information which was readily available. Information from additional unnamed sources also failed to satisfy either the veracity or basis of knowledge requirements. Although the defendant had been arrested within the past year, presumably for cocaine distribution, which "is entitled to some weight in a probable cause determination", the totality of the situation failed to "salvage an otherwise inadequate affidavit".

Warrant based on first-time informant held to be adequate. Commonwealth v. Voris, 38 Mass. App. Ct. 377 (1995)

The police received a tip from a first-time informant that he had bought marijuana from the defendant, a musician, at the defendant's home. The police subsequently stopped a person outside the defendant's house who claimed to be visiting the

defendant, and observed that he "reeked" of marijuana. Surveillance of the defendant's house for four nights revealed more than 25 people making short visits there. Registration checks of the visitors' cars showed that two of them had criminal records for drug offenses. Lastly, an individual seen leaving the defendant's house was stopped for a traffic violation and a search of the car uncovered a large quantity of hashish, marijuana, and two digital beepers.

The Appeals Court held that these facts established sufficient probable cause to support a search warrant. The CI's statement that he had obtained drugs from a musician in a specific place, coupled with specific and detailed facts about the transaction, satisfied the "basis of knowledge" requirement. The Court also held that the "veracity" prong was satisfied through independent police corroboration even though the CI had not provided prior information to the police about drug sales.

B. **Searches without a warrant**

Warrantless search of person upheld where threshold inquiry triggered probable cause to arrest; suppression of contraband seized from car affirmed. Commonwealth v. Alvarado, 420 Mass. 542 (1995)

Two defendants, Londano and Alvarado, were arrested for trafficking in cocaine. Following their arrest, they moved to suppress cocaine found on Londano's person and from his car.

The defendants were stopped by a state police officer because of peculiar driving. As the trooper approached the car, he noticed Londano, who was the passenger at the time, place a glassine bag down the front of his pants. Londano denied that he had put anything there. Upon being asked where he was from, Londano first answered Puerto Rico, and then admitted he was from Medellin, Colombia.

The trooper next asked the driver, Alvarado, for his license and registration. Alvarado produced a license which the trooper believed was false, and provided the trooper with a false social security number.

The trooper then pat frisked Londano and felt a bulge in the front of his pants. Londano admitted it was cocaine. Upon his arrest, Londano stated that Alvarado had been with him when he had purchased the cocaine in Lowell. As the trooper went to arrest Alvarado, he noticed Alvarado's hand near a coffee maker box.

Following the arrests, the car was towed to the barracks and searched twice, the second time with a narcotics canine. Nothing was found. After the second search, the trooper noticed the coffee maker box had been placed on the roof of the car. He took the box, opened it, and found a plastic bag containing a large quantity of cocaine in the water well of the coffee maker.

The SJC upheld the search of Londano's person, and stated that the trooper's threshold inquiry triggered probable cause to arrest him, and therefore, the seizure of the cocaine from his pants was a valid search incident to arrest.

With regard to the cocaine found in the coffee maker, however, the SJC affirmed the granting of the defendant's motion to suppress. In doing so, the Court rejected the Commonwealth's argument that the search was lawful as incident to an arrest on the ground that the seizure did not happen contemporaneously with the arrest. The Court further stated that the search of the coffee maker exceeded the scope of a permissible inventory search, and noted that due to the use of a narcotics canine, the search was not for inventory purposes, but was part of an investigation. Finally, the Court held that the search was not valid based on the automobile exception to a warrant requirement where the police lacked probable cause to believe the car contained additional amounts of cocaine or evidence of a crime.

Defendant's failure to produce license upon threshold stop gave police probable cause to arrest and entitled police to conduct protective search of car for weapons. Commonwealth v. Lantigua, 38 Mass. App. Ct. 526 (1995)

Two police officers pulled the defendant's car over for a traffic violation. The defendant failed to produce a license but offered to get the registration from the glove compartment. For safety reasons, one of the officers wanted to look into the car first and saw, in plain view, plastic bags containing white powder on the floor. He then opened the glove compartment and found another bag of white powder. The defendant was arrested for possession of cocaine, operating without a license, and failing to stop at a stop sign.

The Appeals Court upheld the denial of the defendant's motion to suppress. The Court held that the officers were justified in stopping the car once the defendant had committed a traffic violation, and when he failed to produce a license, the officers had probable cause to arrest him. The search of the car was permissible for two reasons. One, the inability to produce a license or registration "reasonably gives rise to a suspicion of other offenses," and "justifies heightened precautions" for the officers' safety. Hence, the officers were permitted to effect a protective search for weapons, analogous to a pat frisk. Second, the officers could have attempted to obtain the registration themselves. The Court expressly acknowledged the dangers faced by police officers while performing routine traffic functions.

Motion to suppress contraband allowed where arrest was extraterritorial. Commonwealth v. Zorilla, 38 Mass. App. Ct. 77 (1995)

The defendant was driving in Brookline with a broken taillight when a Brookline police officer tried to stop him. When the defendant finally pulled over, he

was 100 yards into Boston. As the officer approached, he saw the defendant reach over to his right. The officer performed a pat frisk of the defendant and a "plain view" search of the car, but both were fruitless. The officer then reached under the driver's seat and found a bottle of "cutting agent" and plastic baggies. A more thorough search revealed contraband.

The defendant's motion to suppress, on the ground that the police officer had gone beyond his jurisdiction when he stopped the defendant, was permitted in district court. The Appeals Court rejected the Commonwealth's request to expand St. 1979, c. 607, which permits Brookline police officers to exercise the power of arrest 500 yards into Boston for an offense which, if committed in Brookline, would be grounds for an arrest. The Court stated that since a broken taillight is not an arrestable offense, the suppression order must be upheld.

Pat down of companion of arrested individual held lawful. Commonwealth v. Wing Ng, 420 Mass. 236 (1995)

The police had a warrant to arrest John Ng for armed home invasion. A reliable informant told an INS agent that John Ng, his brother Wing Ng, and others could be found at a particular restaurant and that they were travelling in a silver Subaru with the license plate identified. Two INS agents saw John Ng leave the restaurant with others, and followed him to another restaurant. At that point, two Randolph police officers and between 8 and 10 Boston police officers joined the INS agents. After the group reentered the car, the police approached with guns drawn. Wing Ng, the defendant, was in the driver's seat. He made no furtive gestures before or after his removal from the car and he identified himself upon request. An officer conducted a pat frisk and found a semiautomatic handgun in his belt.

The SJC took the case (discussed in the February, 1995, LEN) upon further appellate review and agreed with the Appeals Court that the order granting the motion to suppress the gun should be reversed. Calling the question "close", the SJC concluded that all the facts known to the police could lead a reasonable police officer to suspect that the defendant might have been armed and a threat to the safety of the officers or others. The Court noted that his brother had been arrested for a violent felony during which a weapon had been stolen, and that the defendant and his brother were on friendly terms. Thus, it was plausible to consider that the defendant might have been a participant in the armed home invasion and that he could be armed. The Court ruled as such notwithstanding its acknowledgement that there was a "substantial police presence" at the time the pat frisk occurred, and the police had no knowledge whether or not the defendant had been involved in the home invasion.

Absent exigent circumstances, police cannot forcibly enter an individual's home to serve an involuntary commitment order. McCabe v. City of Lynn, 875 F. Supp. 53 (D. Mass. 1995)

Due to psychological problems, a physician signed an order authorizing the civil commitment of Rose Zinger

pursuant to G.L. c. 123, § 12(a). The following day, the police went to Zinger's home to serve the commitment order. When she did not answer the doorbell, police broke down the door, handcuffed her, and forced her out of the apartment. During this incident, Zinger suffered a fatal heart attack.

Zinger's estate filed a federal civil rights suit pursuant to 42 U.S.C. § 1983 against the City of Lynn. In granting the plaintiff's cross-motion for summary judgment, the United States District Court held that the city's policy of forcibly entering individuals' homes to serve involuntary commitment orders, absent a warrant or exigent circumstances, violated the Fourth Amendment of the U.S. Constitution.

Motion to suppress denied upon reconsideration based on inevitable discovery rule despite failure of warrant to arrive on premises prior to commencement of search. Commonwealth v. Delacruz, Essex Superior Court, Crim. Nos. 25389-91

The defendant is charged with several drug offenses, including trafficking in cocaine in excess of two hundred grams. She moved to suppress cocaine seized from an apartment in 1993 because the search began after the warrant was issued, but before it arrived at the premises. See Commonwealth v. Guaba, 417 Mass. 746 (1994). In November 1994, the Superior Court allowed the motion to suppress, holding that the principles of Guaba apply to a pre-Guaba search.

In March, 1995, the Commonwealth moved for reconsideration, arguing that although the search began before the warrant arrived at the premises, the evidence need not be suppressed under the inevitable discovery exception to the exclusionary rule. Upon reconsideration, the Superior Court applied the inevitable discovery rule, stated that the police officers had not acted in bad faith, and denied the motion to suppress.

Requiring a defendant to spit visible plastic packets out of his mouth was a lawful seizure. Commonwealth v. Thomas, 38 Mass. App. Ct. 928 (1995)

Police officers stopped a defendant, whom they knew, for casual conversation. While talking, the police noticed plastic packets in the defendant's mouth. The Appeals Court held that the initial conversation did not constitute a stop or seizure under the Fourth Amendment, and the seizure of the plastic packets, which contained cocaine, was lawful under the plain view doctrine.

Threshold inquiry permissible where police stopped defendant based on officer's personal knowledge of defendant's prior arrest and reasonable concern that defendant had defaulted on court appearance. Commonwealth v. Mulero, 38 Mass. App. Ct. 963 (1995)

During a routine patrol, a police officer recognized a defendant whom he had arrested six months earlier for possession of a shotgun. Concerned that the defendant may have defaulted on a court appearance, the officer stopped his cruiser and asked the defendant if he had gone to court on the case. When the defendant didn't respond, the officer radioed for a warrant check. At that point, the defendant began swearing and flailing his arms, and refusing to place his hands on the car as directed. As a result, the officer arrested him for disorderly conduct. While in the cruiser, the officer heard the defendant, in Spanish, direct an individual to pick up a bag the defendant had dropped underneath the cruiser. The officer got out of the cruiser and opened a small brown paper bag located near the rear of the car. The bag contained heroin.

The Appeals Court upheld the denial of the motion to suppress, holding that the bag of heroin was admissible where the officer had a reasonable articulable ground to conduct a brief investigatory threshold inquiry based on his personal knowledge of the defendant's shotgun offense and his concern that the defendant had defaulted. The Court stated that despite the officer's statement to the contrary, the defendant was free to leave during the initial inquiry. The Court further held that because the defendant had not been seized, and because he had relinquished control over the bag of heroin prior to dropping it, no Fourth Amendment rights were implicated.

Motivation of officer irrelevant when making a stop after witnessing a traffic violation. Commonwealth v. Santana, Commonwealth v. Suozo, 420 Mass. 205 (1995)

The defendants were riding in an automobile when two Massachusetts State Police troopers noticed that their vehicle had a broken taillight and attempted to pull them over. The defendants kept driving for approximately one and one-half miles after the troopers had activated their blue lights, and did not stop until the troopers drove alongside their vehicle and physically signaled them to pull over.

After stopping the vehicle, the troopers noticed the ignition was hanging from a damaged steering column. When they questioned Santana, the driver, about the ignition, he responded by telling them he was the vehicle's owner. The troopers suspected the car was stolen, and ordered Santana out. Meanwhile, the defendant on the passenger side, Suozo, exited the vehicle and handed one of the troopers a carton of milk which had been on the floor beside him. Surprised by the defendant's actions, the trooper leaned into the vehicle to place the carton on the floor where it had been. In doing so, he noticed a clear plastic bag under the passenger seat, which he suspected was cocaine. Both Santana and Suozo were then arrested for trafficking

cocaine. Following their arrests, they filed identical motions to suppress the evidence found in the automobile.

The defendants argued that the troopers had used the broken taillight as a pretext to stop and search the vehicle. They contended that no reasonable officer would have made the stop without having an underlying motive to search for drugs. The defendants asked the Court to adopt a "reasonable police officer" test. Under such a test, the Court would determine whether a reasonable officer would have made the stop even without any underlying motive. The SJC rejected this approach, and applied the "authorization" approach which provides that police conduct is to be judged by an objective standard of reasonableness, without examination of underlying intent or motive. The Court held that the troopers were justified in making the initial stop based on the fact that they had witnessed a traffic violation. Further, the Court noted that since the troopers had followed standard police procedure, no examination of underlying motives was necessary.

The SJC also held that since the bag of cocaine was in plain view when the trooper leaned into the vehicle, there was sufficient probable cause to search. The court noted that the trooper's decision to return the carton of milk was objectively reasonable, and therefore, since he inadvertently came across the cocaine, the seizure was lawful.

The SJC further held that the troopers were justified in ordering the defendants out of the vehicle. The court stated that a reasonably prudent person in the trooper's position would have believed his safety was in danger.

II. CRIMINAL PROCEDURE

The Supreme Judicial Court adopted a "per se" approach to unnecessarily suggestive identifications under the state constitution and rejected the "reliability" test accepted by the United States Supreme Court. Commonwealth v. Johnson, 420 Mass. 458 (1995)

The victim of a robbery described his male assailant as a twenty-seven to thirty-year old black mail, six feet tall, medium build, weighing 170 pounds, and wearing a black cap, blue jeans and a brown sweatshirt. The female assailant was described as white, with a limp. After being shown six books of photographs and a line-up, the victim could not make a positive identification. The following day, the victim was again brought to the police station to view two suspects. Of the group of six to eight people, one adult black male was present, and a female with a limp was the only adult white female present. The victim made a positive identification. The defendant had several physical characteristics that did

not match the victim's initial description. Specifically, the victim had failed to mention that his assailant had a moustache and was missing several front teeth.

The defendant filed a motion to suppress the pre-trial identification. The motion judge ruled that the showup was unnecessarily suggestive, but held the identification admissible because it was otherwise reliable.

The Supreme Judicial Court, ruling under article 12 of the state constitution, adopted a per se exclusion rule, holding that unnecessarily suggestive identifications are absolutely inadmissible. The defendant bears the burden of demonstrating, by a preponderance of the evidence, that the witness was subjected to an unnecessarily suggestive confrontation which violated due process. Once established, the prosecution is barred from introducing that particular confrontation in evidence at trial. In so holding, the SJC rejected the "reliability" test established by the United States Supreme Court in 1977 in Manson v. Brathwaite, 432 U.S. 98 (1977), and previously followed by the Appeals Court.

Subsequent identifications made by the same witness, however, may be admissible but only where they are not the product of the suggestive identifications. In other words, the other identifications must have an independent source which the prosecution must demonstrate by clear and convincing evidence. In determining whether a separate identification has an independent source from the unnecessarily suggestive confrontation, the Court must consider six factors: I) the extent of the witness's opportunity to observe the defendant at the time of the crime; and prior errors, if any, in 2) description; 3) identifying another person, or 4) failing to identify the defendant; 5) the receipt of other suggestions, and 6) the lapse of time between the crime and the identification.

Sentence following retrial may only be harsher than initial sentence if judge's reasons appear on the record and are based on information not before first sentencing judge. Commonwealth v. Hyatt, 419 Mass. 815 (1995)

Following a retrial on charges of aggravated rape and armed robbery, the defendant received a harsher sentence on the armed robbery conviction than he received at his first trial. The SJC upheld the guilty verdicts, but vacated the sentence on the armed robbery charge. In so doing, the Court held, that as a matter of state law, upon a retrial, a second sentencing judge may impose a harsher sentence only if the reasons are stated on the record and are based on information that was not before the first sentencing judge.

Grand jury testimony of witness deemed waiver of privilege against self-incrimination at trial. Commonwealth v. Nakia Lane, Worcester Superior Court, Crim. No. 94-0483; Commonwealth v. Jermaine Heath, Worcester Superior Court, Crim. No. 94-0482

A fifteen and one-half year-old witness rode in a car with two defendants who

planned an armed robbery. During the robbery, the witness remained in the car and was present as the defendants displayed items stolen during the robbery. After consultation with counsel, the witness invoked her privilege against self-incrimination and refused to testify at a probable cause hearing. Two weeks later, the witness, with whom counsel was present, testified at the Grand Jury about the incident without asserting her privilege. In a pre-trial motion, the Superior Court ruled that the witness's grand jury testimony was self-incriminating, voluntary, and a waiver of her privilege against self-incrimination at the forthcoming trial.

Denial of motion to disclose contents of mental health records of rape victim to expert prior to rape upheld. Commonwealth v. Syrafos, 38 Mass. App. Ct. 211 (1995)

The defendant, charged with rape, claimed the trial judge erred in denying his motion to disclose the contents of victim's mental health records to an expert. At trial, the defendant claimed sexual intercourse was consensual, and argued that the victim's mental health records would reveal that she had fabricated the rape because she suffered from "flashbacks" of prior sexual abuse. In denying the motion, the trial judge found, and the Appeals Court affirmed, that the records failed to support the defendant's theory. The Appeals Court further concluded that even if an expert had been permitted to examine the records, testimony by the expert on the issue of the victim's credibility would have been inadmissible.

Mass. R. Crim. P. 36 does not apply to a probation revocation hearing. Commonwealth v. Whooley, 419 Mass. 421 (1995)

An incarcerated defendant moved for the speedy disposition of a default warrant issued against him. General Laws c. 279, § 3, provides that when a prisoner has made such an application, disposition shall be granted within six months. The hearing was 10 months later, at which time the judge revoked the defendant's suspended sentence and imposed a committed sentence. The defendant filed a motion for release from unlawful restraint pursuant to Mass. R. Crim. P. 30(a), arguing that because the statutory 6-month period was not adhered to, the charges should be dismissed under Mass. R. Crim. P. 36(b) (the speedy trial rule). The motion was denied, and the SJC affirmed, holding that Rule 36 does not apply to probation revocation hearings, but applies exclusively to the speedy trial of original criminal charges. The SJC further held that, in the absence of prejudice, automatic dismissal is not required under G.L. c. 279, § 3, if the disposition does not occur within six months.

III. CRIMINAL STATUTES INTERPRETED

Police failure to provide defendant with timely bail consideration resulting in inability to obtain independent breath or blood alcohol test did not require dismissal of criminal complaint. Commonwealth v. Priestley, 419 Mass. 678 (1995)

At approximately 4:00 a.m., the defendant was arrested for operating a motor vehicle while under the influence of intoxicating liquor after failing three field sobriety tests. At the station, the defendant was "Mirandized", and advised of the right to have an immediate examination by a physician selected by him pursuant to G.L. c. 263, § 5A. The defendant indicated his interest in "being bailed out quickly". Despite the request, the police did not call the bail commissioner until 6:00 a.m., and the defendant was not released until after 8:30 a.m. The defendant sought to have his complaint dismissed based on the police's failure to provide him with the opportunity for bail, thereby preventing him from obtaining an independent medical examination under § 5A, which he claimed, would have provided him with exculpatory evidence.

Although in the Hampe case (see below), the SJC held that absent exigent circumstances, the police should contact a bail commissioner in a timely fashion, or permit a defendant to arrange his own bail hearing, here, there was no finding that the police prevented the defendant from seeking bail on his own and there was evidence that the defendant had made many telephone calls and obtained advice from his lawyer. Due to the overwhelming evidence of his guilt, particularly his own incriminating statements, the SJC affirmed the defendant's conviction.

Denial of access to bail commissioner violates G.L. c. 263, § 5A, but remedy not necessarily dismissal of complaint. Commonwealth v. Hampe, 419 Mass. 514 (1995)

The defendant was arrested for operating under the influence of alcohol at approximately 2:30 a.m. At the station, he was advised of his rights under Miranda, to use a telephone, to take a breathalyzer test, and to obtain an independent blood test. Two blood tests were taken, and the results were 0.11 and 0.12, respectively. The defendant thereafter requested an independent blood test, and he sought to be released as "quickly as possible".

The police held the defendant in protective custody and did not call a bail commissioner. In the morning, the defendant was brought to court, and ultimately released after arraignment.

The SJC held that the defendant's statutory rights under G.L. c. 276, §§ 42, 57 and 58, in conjunction with his statutory right to an independent blood test under G.L. c. 263, § 5A, had been violated. Although the police have no obligation to assist a defendant in obtaining a medical examination, the police cannot hamper or prevent a defendant's "reasonable and timely" attempt to get such an exam. Time, the Court admonished, is of the essence when testing blood alcohol levels.

Absent exigent circumstances, the police should telephone a bail commissioner when courts are not in session, or allow a defendant to make his own arrangements for a bail hearing. Here, the SJC determined that the police had obstructed the defendant's release on bail. In so doing, the Court flatly rejected the officer's argument that he was holding the defendant in protective custody.

Although the SJC cautioned that dismissal may be appropriate where there is deliberate or intentional misconduct by the police, the Court declared that generally, the remedy should be suppression of the breathalyzer test, and certain "other police testimony", including observations made and opinions formed at the scene when the defendant was placed under arrest. The remedy must be "adequate to cure potential or actual prejudice" resulting from a violation of G.L. c. 263, § 5A.

Convictions for indecent assault and battery on a child under fourteen, and over fourteen, reversed where the Commonwealth failed to prove lack of consent. Commonwealth v. Feijoo, 419 Mass. 486 (1995)

The defendant's convictions for indecent assault and battery on a child under fourteen, and over fourteen, were reversed based on the Commonwealth's failure to prove lack of consent on the part of the alleged victims. (The offenses occurred prior to the effective date of an amendment to G.L. c. 265, § 13B, which provides that a child under fourteen is incapable of consenting to sexual conduct). The Court also reversed the defendant's conviction for rape, concluding that the evidence did not warrant a finding that the alleged victim submitted to the defendant as a result of intimidation, rather than for another reason, such as the hope that he would benefit from his behavior.

In affirming several convictions for rape and indecent assault and battery on a person fourteen or older, the Court rejected the defendant's claim that his motion to suppress should have been granted where several items seized were not described with particularity on the warrant. The Court held that there was a sufficient nexus between the seized items, all of which were of an explicit sexual nature, and the crimes under investigation.

Regulations on periodic testing of breathalyzer machines not statutorily required. Commonwealth v. Livers, 420 Mass. 556 (1995)

The SJC reversed the granting of a motion to suppress breathalyzer test results, rejecting the defendant's argument that there were no state regulations concerning periodic testing of the breathalyzer machines at the time the tests were conducted. The Court held that all G.L. c. 90, § 24K,

requires is a program for periodic testing of breathalyzer machines, not regulations. (There are currently regulations on point). In a footnote, the Court reminded the parties that the Commonwealth must prove that it had an "appropriate testing program" when such tests occurred, and that the machine used had been "successfully tested" under that program.

Exposure of pubic hair does not constitute indecent exposure. Commonwealth v. Arthur, 420 Mass. 535 (1995)

The defendant pulled down his shorts, exposing his genital area and pubic hair to a mother and her nine-year old daughter. He was convicted of indecent exposure in violation of G.L. c. 272, § 53. The SJC reversed the conviction, holding that the statute was unconstitutionally vague in that it did not provide notice to the defendant that exposure of his genital area, including pubic hair, as opposed to his genitalia, would constitute the crime of indecent exposure.

Intent to put another in fear of bodily harm is a necessary element of the crime of assault by means of a dangerous weapon. Commonwealth v. Musgrave, 38 Mass. App. Ct. 519 (1995)

The defendant and another man were stopped by a uniformed police officer. While the officer began patting down the second man, the defendant moved his hand toward his waist and then his ankle. The officer noticed a gun barrel protruding from the defendant's hand. The officer was scared and wrestled the gun away from the defendant.

The defendant testified that the gun was an inoperable pellet pistol, and that he had moved his hand to his waist area to get rid of the gun before the officer began to pat him down.

The defendant was convicted of assault by means of a dangerous weapon in violation of G.L. c. 265, § 15B. He appealed claiming instructional error, and the Appeals Court reversed his conviction.

The defendant argued that "the court erred by refusing to instruct the jury that intent to put another in fear is a required element of the crime of assault by means of a dangerous weapon." Contrary to the defendant's request, the judge followed the assault charge in the Model Jury Instructions for Criminal Offenses Tried in the District Court Department Section 5.402. The judge instructed the jury that they must find that the defendant "intentionally engaged in menacing conduct...that reasonably caused the victim to fear that he was imminently going to be subjected to battery by the defendant."

During deliberations, the jury requested that the judge clarify the meaning of the phrase "menacing act". The judge defined "menacing act" as "any intentional act which would reasonably place another person in fear." The judge did not instruct that proof of intent to cause fear is a required element of assault by means of a dangerous weapon.

Under the instructions as they were given, the jury could have found the

defendant guilty based solely on the perceptions of the officer without giving any consideration to the intent of the defendant. The Appeals Court held that the judge should have instructed the jury that intent to cause fear or apprehension of bodily harm was required for a conviction of assault by means of a dangerous weapon.

Expungement of Department of Probation records not an available remedy. Commonwealth v. Roe, 420 Mass. 1002 (1995)

The defendant was arraigned on charges of unlawful possession of a sawed-off shotgun, possession of a firearm without a firearms identification card, assault by means of a dangerous weapon, and threatening to commit a crime. The charges were dismissed for lack of prosecution. Subsequently, the defendant moved for expungement of her probation record. The District Attorney's office and the police opposed the motion. The District Court judge denied the defendant's motion.

Reiterating its holding in Commonwealth v. Balboni, 419 Mass. 42 (1994), the SJC affirmed, stating that because the legislature provides that sealing of such records under G.L. c. 276, § 100C, is the exclusive means to provide confidentiality to most defendants, expungement is not an available remedy.

Sealing of criminal records requires completion of a two-stage procedure. Commonwealth v. Doe, 420 Mass. 142 (1995)

The defendant was charged with rape and other sexual offenses. After an investigation, the District Attorney's office entered a nolle prosequi as to all the charges. The defendant filed a petition to seal his record under G.L. c. 276, § 100C. The SJC held that the District Court judge had properly denied the petition.

In balancing the defendant's interest in confidentiality with the right of access to records of criminal proceedings as guaranteed by the First Amendment to the U.S. Constitution, the SJC ruled that sealing could only be accomplished after a two-stage hearing. The first stage requires the defendant to make a prima facie showing in favor of sealing at an informal hearing. If successful, the court must hold a more extensive, second-stage hearing. Prior to that second hearing, the defendant is required to post notice of the hearing in a conspicuous place in the courthouse, and provide notice to the District Attorney (who should, in turn, provide notice to the victim and inform the victim that he or she is entitled to appear and be heard), the Department of Probation, and other interested parties.

The defendant is required to

demonstrate, and the judge is required to make findings that "substantial justice would be served by sealing". The Court must be informed of the reason that the charge(s) was dropped, and the defendant must demonstrate the risk of a specific harm, beyond that of a general threat to reputation or privacy, if the record is not sealed.

IV. EVIDENTIARY ISSUES/JURY INSTRUCTIONS

Introduction of forty-two photographs and videotape of crime scene upheld at murder trial; consciousness of guilt instruction no longer mandated absent request by counsel. Commonwealth v. Simmons, 419 Mass. 426 (1995)

Forty-two photographs and a 12-minute videotape of the crime scene were admitted into evidence at defendant's trial for first degree murder by reason of extreme cruelty and atrocity. The SJC upheld the admission of the photographs and videotape as relevant to the prosecution's theory of the case. The Court stated that videotapes "can be a reliable evidentiary source". The Court also upheld the trial judge's qualification of a state chemist as a blood pattern analysis expert.

In its decision, the SJC reversed its earlier holding in Commonwealth v. Cruz, 416 Mass. 27 (1993), that a trial judge must instruct on consciousness of guilt and held that from now on, judges have discretion to instruct on consciousness of guilt absent a request by counsel.

Juror unanimity required on theory of culpability in first degree murder cases. Commonwealth v. Berry, 420 Mass. 95 (1995)

While a juvenile, the defendant stabbed an elderly woman to death. After a transfer hearing, he was tried as an adult and convicted of first degree murder. On appeal, the defendant challenged, among other issues, his transfer and the failure of the jury to agree unanimously on a theory of culpability.

The SJC upheld the transfer order and discussed the statutory requirements for transferring a juvenile. In so doing, the Court restated the principle that, in determining whether a juvenile is amenable to rehabilitation within the juvenile system, the judge need only focus on the juvenile's potential for successful treatment prior to the age of eighteen. (The transfer order in this case was issued before the amendment to the transfer statute which created a rebuttable presumption of non-amenability to rehabilitation in cases where juveniles are charged with murder or other violent crimes.)

The Court also held that in future cases, on request, the trial judge must instruct the jury that in cases of first degree murder, the jury must agree unanimously on the theory of culpability (i.e., felony murder, deliberate premeditation, or extreme cruelty or atrocity).

Reference to defendant's jailing for contempt in related civil case prejudiced his criminal trial. Commonwealth v. Fallon, 38 Mass. App. Ct. 366 (1995)

The defendant was tried on charges of larceny and securities fraud based on his fleecing of a 79-year-old victim who had entrusted her inheritance of more than $ 3,600,000 to him. The victim sought an accounting and the return of her money. After the defendant refused, the victim brought a civil action to recover the money. In that action, the defendant refused to comply with discovery orders that he disclose how he had invested the money. He was held in contempt of court and jailed for sixty days until he produced the requested records.

In his criminal trial, the jury learned of the defendant's contempt and jailing in the civil case when the prosecutor mentioned it in the opening statement. The defendant then brought out evidence of the contempt and jailing in cross-examination of the victim's lawyer, who testified about the civil case. On appeal, the defendant claimed that he was unduly prejudiced by this information. The Appeals Court held that because the issues in the civil contempt and incarceration were so closely intertwined with the issues in the criminal case, the defendant had been prejudiced by the references and the introduction of evidence of the contempt and jailing without adequate cautionary or limiting instructions from the judge. The judgment was reversed and the case was remanded for a new trial. Further appellate review has been granted by the SJC.

Refusal to take field sobriety tests is inadmissible at trial. Commonwealth v. McGrail, 419 Mass. 774 (1995)

Following his arrest for operating while under the influence of alcohol, the defendant refused to undergo field sobriety tests. The defendant sought to prohibit the Commonwealth from introducing evidence of the refusal. Although the trial judge denied the defendant's motion, the Supreme Judicial Court reversed, holding that the refusal constitutes testimonial evidence and as such, would violate the defendant's privilege against self-incrimination if admissible.

Jury instruction commenting on absence of blood alcohol evidence violated defendant's right against self-incrimination. Commonwealth v. D'Agostino, 38 Mass. App. Ct. 206 (1995)

At the defendant's trial on charges of operating under the influence of alcohol, the court admitted into evidence statements made by the defendant during the roadside stop. On appeal, the defendant challenged the admission of the statements on the grounds that he hadn't received Miranda warnings, and challenged the

court's jury instruction regarding the absence of blood alcohol evidence. The Appeals Court ruled that the on-the-scene questioning by the police was non-custodial and thus, Miranda warnings were not necessary. The Court reversed the defendant's conviction, however, holding that the jury instruction commenting on the absence of the blood alcohol evidence violated his right against self-incrimination.

V. CIVIL RIGHTS

Federal civil rights suit against former District Attorney and staff in "Highway Killings Case" dismissed by First Circuit Court of Appeals. Souza v. Pina, et al., 53 F.3d 423 (1st Cir. 1995)

Former District Attorney Ronald Pina, and three members of the DA's staff were sued by the mother of Anthony R. Degrazia, a suspect in the serial murders of nine women in the New Bedford area during 1988 and 1989. Degrazia committed suicide, and the plaintiff (his mother) charged that the defendants acted with reckless disregard of Degrazia's constitutional rights by publicly linking, in the media, Degrazia with the murders.

The First Circuit held that the United States District Court erred in denying the defendants' motion to dismiss where they were entitled to qualified immunity for their actions. The Court determined that the plaintiff's complaint failed to assert a violation of any constitutional right, and thus, did not allege the violation of a "clearly established" right that would defeat the defendants' claim of qualified immunity. The Due Process Clause requires the State to protect the life of a citizen only where there is a "special relationship", between the State and the citizen. An individual in custody presents such a "special relationship", triggering an affirmative duty to protect on the part of the State. Here, Degrazia was not in custody when he committed suicide. Because the defendants did not impose any restraint on his liberty, the Court held that the protections of the Due Process Clause did not arise, regardless of whether the defendants knew of Degrazia's suicidal predisposition.

VI. JURY SELECTION

First degree murder conviction reversed based on jury selection. Commonwealth v. Vann Long, 419 Mass. 798 (1995)

A criminal defendant of Cambodian descent was convicted in 1983 of murder in the first degree, two counts of armed robbery, and armed assault in a dwelling. During the jury selection process, the judge asked venire members to come to sidebar if they thought the defendant's Cambodian ethnicity would affect their ability to be impartial. One juror stated that he had reasons to be biased towards the defendant because of the defendant's ethnicity, but he "hoped" he could be fair to the defendant. Having exhausted all of his peremptory challenges, defense counsel challenged the juror for cause. The judge denied the challenge because the juror "indicated a willingness to follow the dictates of being fair." Also during jury selection, the prosecutor

used two peremptory challenges to exclude the only two jurors of Hispanic origin. The judge denied defense counsel's request to require the Commonwealth to explain its reasons for exercising its peremptory challenges.

On appeal, the Supreme Judicial Court reversed the judgment and held that the trial judge committed reversible error in two instances. First, in failing to excuse one allegedly biased juror for cause, the judge denied the defendant his right to an impartial jury under the 6th and 14th Amendments. Although the trial judge has a large degree of discretion in the jury selection process, admitting a juror who "harbored a potential ethnic bias" and who never unequivocally stated that he would be impartial, or that he could put aside his bias, was reversible error. Second, in failing to require the Commonwealth to explain its peremptory challenges of two Hispanic members of the venire, the trial judge denied the defendant his right to equal protection under the 14th Amendment; in particular, his right as a criminal defendant to be tried by a jury whose members are selected by non-discriminatory criteria. A juror cannot be excluded solely on the grounds of race and, where there is a pattern of conduct in excluding jurors, the presumption that the peremptory challenge is proper, is rebutted.

Armed assault conviction reversed based on jury selection. Commonwealth v. Robert Futch, 38 Mass. App. Ct. 174 (1995)

A Superior Court jury convicted two black defendants of armed assault in a dwelling house with intent to commit a felony and of armed robbery while masked. During jury selection, the Commonwealth exercised four peremptory challenges as to four of the six black venire members. Defense counsel objected that the Commonwealth was impermissibly using its challenges to exclude minorities. The judge accepted the objection and requested an explanation from the Commonwealth. The Commonwealth provided reasons for the exclusion of each person, including one person's appearance, failure of another to fill out the questionnaire completely, tardiness of one person, sleepiness of another, and the familiarity of one person's name to the prosecutor. The trial judge accepted the Commonwealth's reasons as "not being related to race" and foreclosed the defendant's opportunity for rebuttal.

On appeal, the Appeals Court reversed the judgment and held that the defendants were entitled to a new trial because of the judge's failure to make findings with respect to (1) the Commonwealth's appearance of impropriety in exercising its peremptory challenges, and (2) the sufficiency of the Commonwealth's reasons for the

challenges. A pattern of challenges against members of a discrete group rebuts the presumption of proper use of challenges. The challenging party must provide a neutral explanation and, a trial judge must "undertake a meaningful evaluation of the reasons given by the Commonwealth." The judge should have specifically determined whether the reasons provided by the Commonwealth were bona fide and should not have foreclosed the defendant from an opportunity to rebut the reasons.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The Main office number for all extensions listed below is (617) 727-2200; TTY-(617) 727-4765. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

This publication is available in alternate formats for persons with disabilities. If you would like your copy of Attorney General Scott Harshbarger's Law Enforcement Newsletter in large print, audio-tape or another format, please contact us.

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Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

Contact:(617)727-2200

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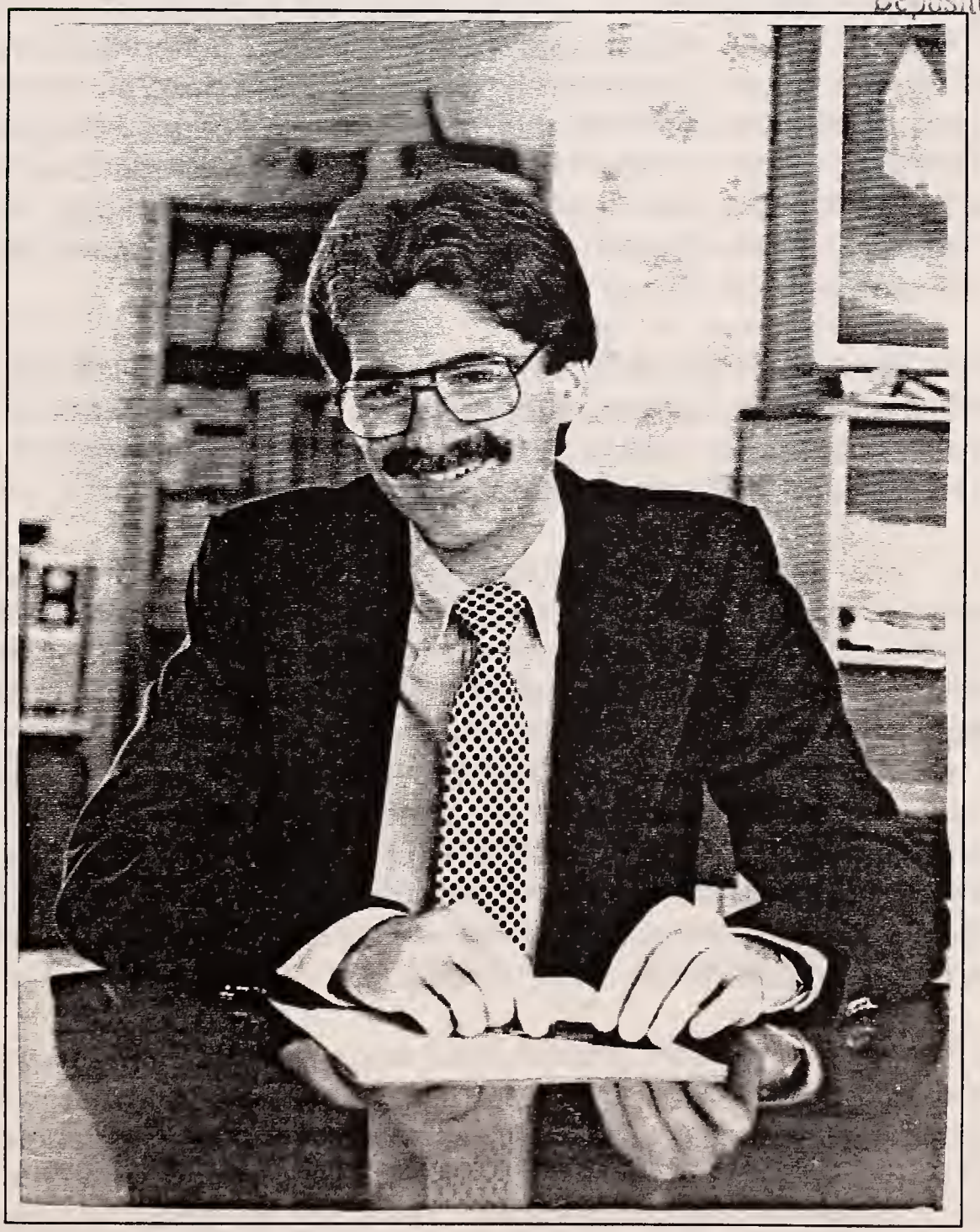
IN MEMORY

OF

PAUL R. McLAUGHLIN
ASSISTANT ATTORNEY GENERAL



October 1995

Letter from the Attorney General:
Memorial to Paul R. McLaughlin

As all of you are aware, Paul R. McLaughlin, a prosecutor and member of the Criminal Bureau of my office, was murdered on Monday, September 25, 1995. His death leaves us shocked, deeply saddened, and angered by the senselessness of the tragedy.

In my remarks at Paul's funeral, I said he was a hero and a friend. Paul was a hero not just because he fought for justice every day of his life, but because he did so with a dedication and commitment that is only found in a few very special human beings. Paul was one of those special few, and those of us who were lucky enough to have known him will miss him dearly.

I first met Paul in 1983 when he joined my staff at the Middlesex District Attorney's Office. In his eight years there, Paul prosecuted hundreds of cases in the District and Superior Courts for crimes ranging from misdemeanors and minor felonies to arson, rape, assault with intent to murder, and armed robbery. Paul also served in the Public Protection Bureau of the DA's Office for two years, where he was primarily responsible for investigating and prosecuting complex economic fraud, public corruption and drug trafficking cases. From the very beginning, it was apparent that this quiet, reserved gentleman was a consummate professional.

In every facet of his life, Paul exhibited a heightened sense of fairness and loyalty. He was compassionate, dogged, sensitive, honest and tenacious. He was funny in an understated way, and his only goal was to serve the public by seeking justice. He was, in short, an invaluable prosecutor and friend.

In 1991, Paul joined me at the Attorney General's office. One of our top priorities was to combat urban violence. Paul readily agreed to become one of the founding prosecutors in the Urban Court Strike Force, operating out of the Suffolk County District Attorney's Office. As part of that unit, Paul focused on priority prosecutions involving gang-related activities, particularly targeting drugs, weapons, and violent crimes. He, along with his colleagues, tried to reduce the violence that plague so many neighborhoods in Boston, he tried to combat the infusion of drugs into the urban communities, and he tried to eradicate guns on the streets. He was tremendously successful in his work, obtaining numerous convictions. And although Paul knew that he alone could not solve the problems of urban life, he knew that he could try his best, and that he did, every single day.

But Paul did not consider that his work began and ended in the confines of the Suffolk County courthouse. After many years prosecuting gang cases, Paul saw the need for a comprehensive multi-disciplinary approach to combatting crime in urban neighborhoods. As a result, he specifically asked to be reassigned to the Safe Neighborhood Initiative, a program originally created by my office, in conjunction with the Suffolk County District Attorney's Office, the Boston Police Department, the Mayor

of Boston, and residents and businesses in the Dorchester area, to stem the tide of escalating violence and improve the quality of life in designated Dorchester neighborhoods. We designed the project to serve as a model crime-fighting and neighborhood revitalization program. When discussions ensued to expand the Safe Neighborhood Initiative into Roxbury, Paul was once again at the forefront, asking to be assigned there.

And soon, because of the efforts of Paul and many other dedicated law enforcement officials and community activists, the Safe Neighborhood Initiative will be moving into the Grove Hall section of Roxbury. In preparation for the project, Paul had become a visible presence in the Grove Hall area, meeting with community members, residents, neighborhood activists, police officers -- all in an effort to fight crime and make the streets safer for everyone. In Paul's memory, we will rededicate ourselves and work even harder to make Grove Hall a successful community prosecution project. His incredible tenacity will be carried on by other prosecutors, many of whom have spoken to me since Paul's death to say that they will continue to fight against crime with a renewed vigor, and a renewed sense of commitment.

Commitment was the hallmark of Paul's life. He was committed to serving the ends of justice, he was committed to making our urban neighborhoods safer, and he was committed to his friends and family. And although Paul's untimely death is tragic, the outpouring of respect and comraderie from the law enforcement community only reinforces my belief that Paul's vision of justice and democracy will be reached someday.

At Paul's funeral, I saw hundreds of people, many of whom I knew, many of whom I did not. Each and every person was touched by Paul's life. We must let his light shine on each of our actions, day in and day out, one person and one neighborhood at a time. If we don't, the forces that prefer darkness to light will claim the victory that Paul McLaughlin, a hero of our times, worked so tirelessly to achieve.

As prosecutors and law enforcement agents, we must not let Paul's death deter us from our goals. His commitment must become our commitment, and his goals must become our goals. We will only strive harder to bring peace to our cities and our state, and in so doing, we will let Paul McLaughlin's light shine forever.

Sincerely,

Scott Harshbarger

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DOMESTIC VIOLENCE UPDATE

Carolyn Keshian, Assistant Attorney General
Amy Maizel Seeherman, Research/Policy Analyst
Family and Community Crimes Bureau

DOMESTIC VIOLENCE/FIREARMS:

In the last edition of the LEN, we discussed the provision of the federal Violent Crime Control and Law Enforcement Act of 1994 which prohibits a person who is the subject of certain court imposed restraining orders from shipping, transporting, receiving or possessing any firearms or ammunition. 18 U.S.C. § 922(g)(8). In the article, we reported that the Bureau of Alcohol, Tobacco and Firearms (ATF) has interpreted a separate provision of federal law, 18 U.S.C. § 925(a)(1), as allowing a law enforcement officer, although under an abuse prevention order, to possess a gun in the performance of official duties.

Subsequently, we have learned that the Department of Justice (DOJ), the agency responsible for the prosecution of unlawful firearm possession, may disagree with the interpretation of ATF. While no official DOJ position has been announced, the National District Attorney's Association Newsletter (May/June 1995) reported that DOJ had not officially adopted the ATF position and had indicated that DOJ would address this on a case by case basis. Until the federal courts have decided this issue, or an official position has been taken by DOJ, chiefs should proceed cautiously, as the federal law applies even in cases in which a law enforcement officer subject to a protective order has petitioned the court pursuant to c. 209A, § 3B, and has been permitted by a state judge to possess firearms. We, along with the Mass. Chiefs of Police Association, recommend that, at a minimum, in these circumstances, care should be taken to ensure that officers subject to abuse prevention orders do not possess firearms for other than official business, such as restricting possession to on-duty time and arranging for the officer to turn in his or her service weapon at the end of a shift.

We will continue to provide legal updates on this issue as further information becomes available.

LEGISLATIVE DEVELOPMENTS:

No major domestic violence legislation has been enacted since the last edition of the Law Enforcement Newsletter. However, as noted in the last LEN, there is significant pending legislation affecting domestic violence enforcement. Among the

bills filed by the Attorney General's office on which we are urging action is Senate Bill 919, a comprehensive package of domestic violence legislation designed to strengthen the ability of law enforcement officers, prosecutors and the courts to respond to cases of domestic violence; and House Bill 4827, which would explicitly authorize police officers responding to domestic violence incidents to make a warrantless arrest for the offense of threatening to commit a crime upon probable cause that the victim reasonably fears imminent serious bodily harm. If you are interested in the specifics of any pending domestic violence legislation, or in assisting in securing its passage, please contact Assistant Attorney General Carolyn Keshian at (617) 727-2200.

RECENT COURT DECISIONS:

On September 13, 1995, the Supreme Judicial Court decided the case of Commonwealth v. Robicheau, 421 Mass. 176 (1995), affirming the defendant's conviction for violation of a G.L. c. 209A order.

The evidence presented at trial covered several weeks of interaction between the defendant and the victim. The victim had obtained a c. 209A order requiring Robicheau to refrain from abusing her and to stay away from her home. On the day of the defendant's arrest, he drove up to the victim's apartment, yelled up to her from outside of his car, and "gave her the finger." Later that day, Robicheau phoned the victim from another location, and threatened to kill her. The victim testified that she feared for her life and called the police, who arrested Robicheau for violation of the protective order.

The defendant challenged his conviction on several grounds. The Supreme Judicial Court rejected all of his arguments, including his contentions that: (1) his threats were speech protected by the First Amendment; (2) the jury impermissibly returned inconsistent jury verdicts (he was acquitted of threatening to commit a crime); and (3) the evidence was insufficient to support a verdict that he abused the victim.

With regard to the sufficiency of the evidence presented at trial, the Supreme Judicial Court applied the definition of abuse in c. 209A, "placing another in fear of imminent serious physical harm," in determining that a rational jury could have found that the actions and words of the defendant placed the victim in reasonable apprehension that physical force might be used against her.

In drawing this conclusion, the Court considered a number of factors including the victim's relationship with the defendant, his actions on the day of the offense, his verbal conduct and the evidence of the victim's fear.

We have been asked whether the Robicheau opinion clarifies the authority of law enforcement officers to make a warrantless arrest for the crime of threats in domestic violence cases when a c. 209A protective order is not present. The Supreme Judicial Court's ruling in Commonwealth v. Jacobsen, 419 Mass. 269

(1995), discussed in a recent edition of the LEN, has caused significant confusion about the authority of police officers to make such a warrantless arrest, even when the victim reasonably fears imminent serious bodily harm.

While the cases do share some important similarities -- they are both domestic violence cases dealing with verbal threats and what constitutes "abuse" under c. 209A -- the Robicheau decision does not provide any instruction regarding the legal authority to make warrantless arrests for threats that place the victim in fear of imminent, serious bodily harm. Notably, in Robicheau, in contrast to Jacobsen, the defendant was the subject of an existing c. 209A protective order. Thus, while Robicheau contains language lending support to the argument that threats can constitute a misdemeanor involving abuse when the victim reasonably fears imminent serious bodily harm, this does not translate into clear authority for police to make a warrantless arrest in the absence of a c. 209A order. Legislative clarification is still needed. (See Attorney General's proposed legislation, House Bill 4728, described above.)

Also recently decided was the case of Commonwealth v. Kirk, 39 Mass. App. Ct. 225 (1995), in which the Appeals Court reversed the defendant's conviction for assault and battery in a domestic violence case in which the victim had not testified. The Commonwealth sought to establish the identity of the defendant by introducing the victim's c. 209A complaint, the supporting affidavit and the abuse prevention order, including the return of service upon the defendant. The Appeals Court found this evidence to be improperly admitted hearsay, rejecting the contention that it could properly be used for the limited purpose of proving the defendant's identity. Thus, the defendant's conviction was found to be in violation of his constitutional right to confrontation and, without any other evidence of identification, was reversed. Kirk also reaffirmed the admissibility of a victim's statement as a spontaneous utterance, where there are sufficient indicia of reliability, underlining the importance of appropriate inquiry, and documentation of all statements made, when responding to a domestic violence incident.

Finally, in a rescript opinion, Flynn v. Warner, 421 Mass. 1002 (1995), the Supreme Judicial Court declined Flynn's request for relief from a c. 209A order. Flynn argued, unsuccessfully, that he should be granted relief from the order on the grounds that: (1) the affidavit in support of the complaint should have been served upon him with the c. 209A order; (2) the lack of a convenient avenue of appeal of a c. 209A order denied him his rights to due process and equal protection; and (3) hearsay statements in the affidavit were improperly relied upon by the judge. The Court rejected each of these claims, citing as authority Frizado v. Frizado, 420 Mass. 592 (1995), discussed in the last LEN. In its opinion, the Court noted that the judge

was justified in concluding that hearsay statements in the affidavit were sufficiently reliable to be considered in determining whether the complainant was in fear of imminent serious bodily harm.

For more information on these cases, please contact Assistant Attorneys General Carolyn Keshian or Joseph Whalen at (617) 727-2200.

NEW RESTRAINING ORDER FORMS:

New forms for obtaining protective orders pursuant to G.L. c. 209A, promulgated by the Trial Court, became effective October 2, 1995, and replace the forms presently in use. They include a complaint form, abuse prevention order form, address impoundment request form and defendant information form. The defendant information form, which is to be completed by the complainant, is intended to assist police officers in safely and swiftly serving c. 209A orders. It requests specific information concerning the defendant, such as whether or not the defendant has a history of violence towards police officers, drug abuse, or access to firearms.

The Trial Court Administrative Office anticipates that police officers will most frequently use the Abuse Prevention Order form in the packet when proceeding in emergency situations, and asks that officers give the plaintiff the Complaint for Protection from Abuse Form if it is not used for the emergency order, so it can be used in court the next day.

For more information regarding these forms, please contact Assistant Attorney General Joe Whalen at (617) 727-2200.

RECENT RESEARCH - MANDATED REPORTING OF DOMESTIC VIOLENCE:

An article in the June 14, 1995, edition of The Journal of the American Medical Association examines the desirability of enacting legislation to include domestic violence among the categories of cases that health care providers are mandated to report to law enforcement or social service agencies. While the article focuses only on the role of health care providers as mandated reporters, the issues raised are relevant to the law enforcement community.

In "Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-being?" by Ariella Hyman, JD, Dean Schillinger, MD, and Bernard Lo, MD, the authors briefly describe current state reporting laws throughout the country, then present arguments against the mandatory reporting of domestic violence by health care providers. They conclude that mandatory reporting of domestic violence is not desirable and may, in fact, threaten the safety of victims of ongoing abuse.

A. Overview of State Statutes

Almost all states and the District of Columbia mandate reporting by health care practitioners when a patient has an injury which appears to have been caused by a

gun, knife, or other deadly weapon. In addition, eighteen states and the District of Columbia require reports when there is reason to believe that the patient's injury may have resulted from a crime. Some states require health care practitioners to report injuries resulting from an act of violence. Finally, five states (California, Kentucky, New Mexico, New Hampshire and Rhode Island) have mandatory reporting laws which specifically address the issue of reporting when domestic violence or abuse is suspected.

In California, health care providers must report to the police if they provide medical services to a patient whom they suspect is suffering from a physical injury caused by "assaultive or abusive conduct." In Kentucky, any person having reasonable cause to suspect that an adult has suffered abuse, neglect or exploitation must report it to the State Cabinet for Human Resources which, in turn, must notify police, investigate the complaint and provide services where necessary. In New Mexico, any person having reasonable cause to suspect that an adult is being abused, neglected or exploited must report it to the Department of Human Services. In New Hampshire, a person treating a patient for an injury believed to be caused by a criminal act is required to report, except if the injured person was a victim of abuse or sexual assault, is over 18 years of age, objects to the release of information to law enforcement, and is not being treated for a gunshot wound or other serious bodily injury. In Rhode Island, health care providers must report domestic violence, without identifying information, for data collection purposes only.

B. Arguments in Opposition to Mandatory Reporting of Domestic Violence

The authors of the article conclude that laws requiring health care providers to report incidents of domestic violence to police or social service agencies may not achieve their intended goals of enhancing patient safety, holding perpetrators accountable, and improving data collection and domestic violence documentation. Instead, such laws may actually jeopardize the health and safety of victims of domestic violence. Among the reasons why they reach this conclusion are the following:

(1) Batterers often inflict retaliatory violence when their partners seek intervention and report the abusive situation. Many battered women have found that calling the police has led to an escalation of violence. For example, data have revealed that as many as half of batterers threaten violence and more than 30% may assault their partner during prosecution (Hart, 1993).

(2) In the same vein, if battered women fear that reporting may place them and their children at greater risk for harm, they may not be candid about their injuries or they may not seek medical assistance at all.

(3) Although documentation of domestic violence incidents through mandated reporting can be useful for criminal and civil cases, documentation in the medical record can accomplish this goal, while at the same time preserving patient privacy and confidentiality.

(4) While comprehensive and accurate data about domestic violence is essential, mandatory reporting does not accomplish this end. Compliance with such laws is often low and reflects various societal biases.

(5) While mandated reporting may, in some cases, prevent further violence, these laws reflect a paternalistic approach to patient care and threaten patient autonomy. This approach may be harmful to victims by taking away a competent adult patient's fundamental right to make choices about intervention, a standard of the medical profession.

In conclusion, the authors urge that we concentrate our energies and resources on strengthening services by the police, courts and social service providers, and by improving coordination among all the players involved in providing services to victims of domestic violence, instead of focusing upon the enactment of mandated reporting laws which may be detrimental to victims of domestic violence. In addition, they make specific recommendations about training programs for health care providers and other initiatives that should be undertaken within the health care field to benefit victims of domestic violence. Finally, they conclude that "the appropriate role of the health care provider should be to provide ongoing care, to promote policies that promote patient autonomy, to assist survivors of domestic violence in choosing among available options, and to make referrals to appropriate legal and social services."

For additional information about this article, contact Amy Seeherman at (617) 727-2200.

DOMESTIC VIOLENCE RESOURCES:

Following are several national and local domestic violence resource centers:

NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE

Pennsylvania Coalition Against Domestic Violence
Provides comprehensive information and resources, policy development, and technical assistance designed to enhance community response to and prevention of domestic violence.
(800) 537-2238
FAX (717) 545-9456

BATTERED WOMEN'S JUSTICE PROJECT (800) 903-0111

Provides training, technical assistance, and other resources through a partnership of three nationally recognized organizations:

Domestic Abuse Intervention Project of Duluth
FAX (218) 722-1545

Addresses the criminal justice system's response to domestic violence including the development of batterers' programs.

National Clearinghouse for the Defense of Battered Women
FAX (215) 351-0779

Addresses battered women's self-defense issues.

Pennsylvania Coalition Against Domestic Violence
FAX (610) 373-6403

Addresses civil court access and legal representation issues of battered women.

DATING VIOLENCE PREVENTION PROJECT
Carol Sousa, Director
P.O. Box 530
Harvard Square Station
Cambridge, MA 02238
(Tel.) (617) 354-2676
(FAX) (617) 497-4836

COMMUNITY OUTREACH FOR ELDERS: A PRIMER FOR POLICE OFFICERS

John Sofis Scheft, Director
Elderly Protection Project

Many police officers have contacted the Elderly Protection Project, created by the Office of the Attorney General, because their department wants to improve its outreach to elders in the community. They are generally enthusiastic, yet apprehensive, about embarking on a project that *seems* quite different from more traditional policing duties. This article is written to encourage and guide these worthwhile efforts.

COMMUNITY OUTREACH IS NOTHING NEW, JUST AN ORGANIZED ATTEMPT TO EDUCATE AND EMPOWER ELDERS

Community outreach is, in truth, the most traditional of police functions because it involves nothing more than developing greater rapport with people and sharing knowledge that is relevant to their lives. Officers have always been doing this, at least on an informal basis. The challenge for those embarking on more formal community outreach initiatives is to have officers see community outreach as a worthwhile opportunity to recognize and expand upon their intuitive desire to help people in the most effective way possible. Once a department is unified about the value of an organized approach to helping elders, setting up a program becomes easy.

Opposition to community outreach, when it arises, often seems rooted in an officer's concern that he or she is going to be placed in an uncomfortable situation. Officers have mentioned in private that they are poor public speakers, that they are worried they do not have enough to say to people, that they fear elders will develop expectations they can't fulfill, and so forth. Yet, once they try it, officers find that they are quite effective, and that elders appreciate even a little bit of attention and concern. One officer remarked:

> I had never done a presentation before, and I was nervous. When I arrived at the senior center and was introduced, I started walking to the front of the room. People were clapping, and I joked that I had not done anything yet to deserve applause. A woman in the front row said: 'We are clapping because you are a police officer.' I was touched by that. I went on to speak about fraud in the community and took questions. It was a thoroughly enjoyable experience . . .

At other times, community outreach may seem to be a "fringe" program, or pure public relations, at a time when there aren't enough resources to cover the basics. This view underestimates the value of outreach work. Because commitment is based

on understanding, this article begins by explaining the value of community outreach, goes on to address program implementation, and finishes with programmatic suggestions.

WHY TARGET COMMUNITY OUTREACH TOWARD ELDERS?

The Elder Population is Growing

Community outreach is crucial for elders because they increasingly comprise a greater segment of the population. Since 1983, for the first time in our history, the number of people over 65 in this country has outnumbered teenagers. People are living longer and continuing to reside in the community, with 81% of those over 65 currently staying in a home they own. At present, the fastest growing segment of our population is the 85 and over age group. Only a small percentage of elders, 5 to 10%, live in nursing homes, and this figure is not likely to increase in the coming decade as resources for nursing home care diminish and as elders continue to desire to escape the stigma, expense and loss of freedom that they believe accompanies nursing home placement.

These statistics, taken from the barrage of available studies, illustrate one inescapable truth for law enforcement: elder safety and wellbeing is and will continue to be a vital police concern. With increased calls for service from elder citizens and diminished resources in law enforcement, the need for preventive approaches, as opposed to simply reactive measures, will grow.

Elder Misconceptions Lead to Increased Vulnerability

Ironically, elders are most afraid of the crimes they are least likely to experience, while they are largely unaware of the crimes that they are most likely to encounter. Such misconceptions often cause elders to take precautions that fail to make them safer and, sadly, diminish their quality of life. While fear of crime is not limited to elders, it affects them to a greater degree than other segments of the population. Since the 1960's, surveys reveal an escalating concern among elders (and to a lesser degree among others) about crime. This is in marked contrast to surveys compiled in the 1940's and 50's in which crime did not register as a major issue.

On the one hand, elders may be more vulnerable in certain ways. Older citizens typically experience declining strength, hearing and sight. They are less able to resist or flee from attackers and their reaction times are slower. The implications are obvious should they become victims of violent crime. If attacked, they are more

likely to suffer physical injuries and require longer recovery periods than younger people. Knowledge of their vulnerabilities causes elders to become afraid.

Fear can lead elders to worry about crimes that they are least likely to experience. For example, most older people express high fear levels about violent crimes that receive extensive publicity such as homicide, rape, and aggravated assault. Of course, fear of violent crime may be appropriate in certain areas. However, studies by the U.S. Justice Department reveal that older victims are significantly *less* likely to be assaulted than younger victims.

The experience of fear often leads elders to restrict their behavior and diminish their quality of life. Many stay home at night, limit shopping trips, and avoid social interaction with their neighbors. Some withdraw to the point that they impose upon themselves a form of "house arrest." Often this withdrawal may include a reluctance to become involved in activities such as Neighborhood Watch or to attend crime prevention presentations. It may extend to a refusal to report suspicious activities or even to call police when criminal activity is witnessed. Over-dependence on caretakers may also occur. The goal of outreach is to have the elders realistically assess their risks and to point out that, despite their vulnerabilities, elders can take simple precautions to reduce their chance of victimization.

On the other hand, elders tend to underrate certain crimes that do, in fact, pose the greatest risk to them. Many older people are unaware of the fact that they are more likely to be subjected to physical abuse and/or financial exploitation by a caregiver, often a family member, than to violent injury at the hands of a stranger. And when they are victimized by a stranger, in the vast majority of cases, the perpetrator is a con artist who utilizes a "chance" meeting or a telephone call to bilk them out of a substantial sum of money. The devastating consequences of these types of crimes are magnified because elders are typically reluctant to report them to authorities due to their embarrassment, shame and sense of denial. Here, the goal of outreach is to help elders understand that abuse, financial exploitation and fraud are very common, and that, if victimized, elders should not be reluctant to call police for assistance.

Education Can Make a Difference

To enhance the wellbeing of the community, it is important that a department do more than just respond to crimes that have occurred. The police must also address the underlying concerns that limit elders' quality of life and increase their risk of victimization.

Education is the key. Only through education will older people understand the most prevalent crimes confronting them and the most effective measures to lessen their vulnerability. And only through education will elders feel comfortable enough to call the police and be aware enough to know how best to report and utilize department services. Thus, law enforcement should implement programs that will:

Focus on the Real Crime Problem

Recognize that the public's fear of crime is not always based upon actual victimization. Determine if local attitudes and fears about crime reflect reality or speculation based upon fear or publicity.

Inform citizens of the facts, using crime analysis data as necessary. Replace myths and rumors with information that applies to your jurisdiction. This will influence people to concentrate their efforts on the likely types of criminal behavior. Citizens of any age who are tormented by unlikelihoods cannot expect to take effective actions to reduce their vulnerabilities.

Teach Risk Reduction

Because a high percentage of crime is opportunistic and requires only a low level of skill to accomplish, people are not defenseless against a great deal of criminal activity. Often, simple and easily implemented measures will be sufficient to discourage or frustrate many criminals. Examples are: locking homes and cars, walking in lighted areas away from buildings, walking in pairs, being aware of one's surroundings, carrying only small amounts of money, carrying a purse close to the body, hanging up the phone when contacted by telemarketers, knowing enough not to participate in sweepstakes or other con artist "giveaways," and avoiding an overreliance on one caregiver.

It is especially encouraging for older people when they learn they can exercise some degree of control to lessen their vulnerability. Because of their fears, many older people have come to believe that there is little they can do to avoid becoming victims other than isolating themselves from their friends.

People of all ages must be cautioned that some criminal activity is insidious and can be very difficult to detect. Frauds, street swindles, and various home invasion schemes fall into this category. Older people should understand that they cannot be defrauded unless they cooperate with the criminal. Learning to "just say no" will empower them to control the situation and frustrate the criminal attempt.

Suggested Orientation

Get Started

Just getting started is the biggest mental hurdle that departments face. A good way to look at building a program is the way one looks at building a house. The builder who gets frustrated because the structure is not complete will be less effective and find the task less enjoyable than the builder who breaks down the project into separate components and congratulates him or herself after each piece of the project gets completed. Ultimately, the specifics of your program are not nearly as important as making sure you take the opportunity to get out into the community and talk with elders. Some of the most successful outreach occurs when officers simply go to their local senior center on a regular basis and have lunch with people. One department which employs this approach has generated a great deal of goodwill among elders and solved several crimes based on information supplied by residents.

Developing rapport with elders by "shooting the breeze," cannot be overrated as a strategy to learn about the community and to encourage elders to trust the police. Key chains, crime prevention lists, and refrigerator magnets with emergency numbers -- to name a few -- are good tools, but they are discarded or ignored unless you develop a human connection with the elders in person, address their underlying reluctance to involve the authorities, and explain the pertinent information and how your department will respond.

Develop a Network

Aside from educating elders, community outreach presents a wonderful opportunity for the police to educate other service agencies about the department, and to learn from those agencies about ways to help elders. One of the best resources in any community is the Council on Aging (COA). The COA can provide a place to hold meetings, and its staff members are usually very knowledgeable about elders in the community. Many COA branches publish their own newsletters. They are usually glad to publish meeting notices and a police column on topical issues such as crime prevention. Activities hosted by the COA or other private clubs provide good forums for you to present brief talks or to enlist volunteers to help with community projects.

Another key organization is your local Protective Services Agency (PSA). The PSA, which is under the direction of the Executive Office of Elder Affairs, receives and responds to reports of elder abuse, neglect and financial exploitation. Staff at the PSA can help you educate elders about abusive relationships and the types of services that are currently available. Staff can also help you become more

knowledgeable about the wide range of elder programs in your community. If you are unsure of which PSA serves your community, call 1-800-922-2275.

Keep *Every* Officer Informed

It is important to keep all officers within your department informed about the community outreach program so they can (1) reinforce the program within the community by referring elders to different events; (2) speak about it to citizens that they meet; and (3) provide input as to whether the program is effective, or in what ways it could be more effective. Keeping officers involved has the added benefit of letting them contribute and develop interest in the program. When the time comes for you to transfer to a different assignment, you will have groomed new leadership so the program does not die from a lack of enthusiasm or knowledge.

Survey the Community

A number of departments have found that a survey is a useful method for discovering prevalent attitudes within the community about crime and police services. Survey results will reflect the areas in which community members need education and attention. For an excellent example of a survey and other elder outreach approaches, call Lt. Jon Tiplady of the Danvers Police at (508) 774-1213.

Involve Seniors Directly

The best programs involve seniors directly. By having seniors help organize and staff community outreach programs, police departments avoid being seen as paternalistic; instead, they are empowering elders by seeing them as partners, not clients, assisting in the protection of the community. In addition, elders are often more open to a crime prevention message or a request for volunteer services when it is delivered by another elder working with law enforcement.

Utilizing senior volunteers to help staff community outreach projects is another highly cost-effective approach. For a detailed guide to setting up your own volunteer program within the department, call the Elderly Protection Project at (617) 727-2200, Extension 2549, and ask for a free copy of *Elder Volunteers in Law Enforcement*. For $10, you can also receive a copy of a videotape that features successful volunteer programs in three Massachusetts communities.

Finally, some programs end up, in the words of the old cliche, "preaching to the choir." The same elders come to all the meetings and hear all the presentations. Try

to reach as diverse an audience as possible. Change locations of meetings, and ask for assistance from the members of your network and from the committed elders that help you develop your programs, so that you can reach as many elders as possible.

Suggested Guidelines for Meetings

Recognize the Special Needs of Older People

Design crime prevention presentations and select locations that take into account the varying ability of older people to see and hear. Speakers should limit presentations to 30 or 40 minutes, and speak slowly without sounding artificial.

Integrate Presentations into Ongoing Activities

It is best to integrate presentations into activities where seniors are already gathered -- for example, during a lunch at the local senior center, during a break at the church bingo game, or as part of an afternoon group of speakers at a local social club. It is more convenient to have a presentation be a part of their normal activities than to make a special trip. Equally important, elders may appreciate the message more when it is communicated in a less threatening environment during an enjoyable activity, rather than as the focal point of a special meeting.

Have Fun!

It bears repeating that the best outreach rests on a foundation of rapport. The key indicator of a good program is if you are having fun. We all know the risk of crime prevention being counterproductive, scaring people more than helping them. Since so much of crime prevention depends on how the elder thinks about safety, you need to speak and present in a way conducive to learning. People learn best when they are relaxed, supported and not overwhelmed with material.

I remember one officer who called to explain that he had run out of material in the first meeting he had with the local senior council. When I asked what he covered, he responded, "Well, I spoke about home security, in-person fraud, telephone fraud, mail fraud, and the local protective services system for abuse and neglect . . . ." Each of those topics would be more than sufficient for one meeting! Avoid the tendency of all presenters to try to cover too much. If you spend 5 minutes talking about a prevention issue (for example, how to avoid telephone scams), another 5 minutes taking questions from the audience, and then 20 minutes mingling, that is a highly useful program. It is better to convey bite-sized pieces of information over several meetings, than to conduct one marathon session.

Finally, you do not need to feel that every meeting or talk has to be about crime prevention. One officer I consulted with had tremendous knowledge of the history of his town. I suggested that he schedule time during one meeting to talk about town

history and to invite elders in the audience to speak about their recollections of the town. Other officers may have other hobbies to share. By making meetings enjoyable and interesting, elders will be more willing to come and participate, so that when you do discuss serious safety issues, you have their attention. Remember, the value of the event is more than the information conveyed, it is the chance for elders to socialize and feel safer about their community.

PROGRAM IDEAS AND CONTACTS

- **TRIAD**. The TRIAD Program means that law enforcement and older community leaders agree to work together to reduce criminal victimization of the elderly and to enhance the delivery of law enforcement services. A TRIAD also works to improve the quality of life for seniors. The program can take a variety of forms and involve such activities as crime prevention training, adopt-a-senior programs, volunteers, telephone reassurance, neighborhood watch, and so forth. TRIAD has become increasingly popular in Massachusetts as a way to bring the police and elders closer together. For expert assistance in starting or expanding your own program, call David Lloyd of the Northwestern District Attorney's Office at (413) 586-9225. At the national level, there is no better contact than Betsy Cantrell, who is the TRIAD Program Manager for the National Sheriffs' Association. Call 1-800-424-7827 and ask for a copy of the TRIAD manual, which is an authoritative guide on how to start and sustain a program.

- **Citizens Police Academy**. The citizens police academy is a good way for members of the community to learn about the police profession. Many departments have had great success with this program. For an example of a superb academy, call Sgt. Brian Rust of the Northampton Police Department at (413) 584-0205.

- **55Alive**. *55Alive* is a program developed by AARP that uses older volunteers to teach other elders remedial driving skills. This program has been proven to reduce accidents and improve the driving habits of its elder graduates. Call Harry F. Montgomery, Jr., Massachusetts Coordinator, at (617) 540-5455, to learn how you can set up a program at your department.

- **Database**. Police can create a database for citizens to voluntarily submit information such as their names, addresses, doctor's name, hospital, chronic illness, neighbor's name, whether neighbor has a key, next of kin, etc. Officers are then aware of this information when dispatched. Police can also register

Alzheimer's Disease patients with the national *Safe Return* registry. For information about *Safe Return*, call (617) 494-5150.

- **Medical Information Inside Refrigerator**. Police encourage elder residents to place medical information inside a tube, which the department provides, inside their refrigerators. The refrigerator was selected as the storage area because of its resistance to fire. A sticker is placed on the refrigerator that indicates that emergency information is stored inside. Police are instructed to look for these stickers when called to an emergency at an elder's home.

- **Senior Victim Assistance Teams**. Referrals are often made to legal, medical and social services for the elderly. Many of these units help the elderly victim complete necessary forms to replace critical identification and credit cards, as well as licenses, food stamps, social security checks and medical equipment. Help may also be provided to repair broken locks or windows to secure the older person's home. Some programs use volunteers or police personnel to assist elderly crime victims through the trauma and ensuing criminal justice process, and to provide transportation for court appearances and medical appointments.

- **Escort Services**. Escort services help reduce opportunities for victimization and fear of crime.

- **Telephone Hotlines or Reassurance Programs**. Volunteers take calls and can assist elders with their needs. Volunteers also prevent abuse by maintaining contact with elders who cannot leave their homes on a daily basis. If the elder does not answer the phone, the police department is notified and officers check on the residence. According to Jennifer Carlin of the San Mateo, California, Center for Abuse Prevention, "Isolation makes people vulnerable to abuse . . . and neglect. It can also cause depression, which can lead to suicide; older adults have the highest rates of suicide in our population." For more information about the TIES program (Teamwork Insuring Elder Support), call 1-800-675-TIES. Closer to home, Plainville, Massachusetts, has a very good reassurance program that is staffed by elder volunteers. For more information, contact Chief Edward Merrick at (508) 695-7115.

- **Adopt-a-Senior**. This program matches officers with seniors who are isolated and vulnerable to abuse. Officers are encouraged to make contact on a regular basis, assess needs, and refer the seniors to appropriate resources.

- **3-Panel Mailing Report**. Patrol officers are given an innovative 3-panel, self-mailing brochure. An officer who identifies an older person who wants non-emergency services will give the elderly citizen the first panel of the brochure, informing the individual that a social worker will contact them. The officer then completes the middle panel of the brochure with a description of the problem

and the contact information. The officer mails it to a social service coordinator. After assessing and providing services, the social worker completes the third panel of the brochure with a description of the action taken and returns it to the original officer to provide feedback.

- **Neighborhood Canvass and/or Security Surveys**. Police and Protective Services use volunteers trained by the department to go door-to-door to canvass citizens in neighborhoods with high concentrations of older adults to determine their needs and assess their safety.

If you know of any other meritorious program ideas, please do not hesitate to call John Scheft, Director of the Elderly Protection Project, at (617) 727-2200, Extension 2555.

THE VICTIM RIGHTS LAW OF 1995

Kathy Morrissey
Victim/Witness Advocate, Criminal Bureau

SUMMARY

The Victim Rights Law of 1995: (1) gives victims a larger and more meaningful role in the criminal justice system; (2) codifies the best practices of prosecutors and victim advocates from across the Commonwealth; and (3) represents a major expansion of the 1983 Victim Bill of Rights (M.G.L. c. 258B). The law took effect on August 13, 1995, as chapter 24 of the Acts of 1995.

ANSWERS TO COMMONLY ASKED QUESTIONS

1. How Does the Victim Rights Law Define a Victim?

The Victim Rights Law defines a victim to be a natural person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime or delinquency offense, as demonstrated by a criminal complaint or indictment or a report to a District Attorney of abuse of a minor, elder or disabled person, including family members where the primary victim is a minor, incompetent or deceased person (e.g., the victim of a motor vehicle homicide). "Family member" now includes step-relations and dependents and excludes alleged offenders.

Victim services may also be offered without a complaint or indictment at any time when the victim initiates contact, directly or indirectly, with the criminal justice system. For example, victim services are routinely rendered during the course of child abuse and elder abuse investigations.

NOTE: Because a victim is defined to be a "natural person," municipalities, corporations, institutions, and other entities are not covered by this statute. However, they may request to be heard by the court on a discretionary basis at the time of sentencing. If there is a parallel civil case pending, no reference should be made to the civil proceeding.

2. What is the Role of the Victim/Witness Advocate under the New Law?

A victim/witness advocate is defined as an individual employed by a district attorney, the attorney general, the Victim/Witness Assistance Board or other criminal justice agencies to provide necessary and essential services in carrying out policies and procedures under this chapter.

Victim/witness advocates are recognized for the first time by statute in the Victim Rights Law. By statute, prosecutors are defined as district attorneys, assistant district attorneys, the attorney general, assistant attorneys general, police prosecutors, specially appointed lawyers and authorized law students aiding with prosecutions and others acting on behalf of the Commonwealth. Victim/witness advocates are included in the umbrella definition of "prosecutor."

3. What General Information is the Prosecutor Required to Provide to the Victim at the Beginning of the Criminal Justice Process?

The prosecutor is required to provide to the victim the following general information at the beginning of the criminal justice process:

* the victim's rights in the criminal justice process;

* how a case progresses through the system;

* the victim's role in the process, and what may be expected of the victim and why;

* upon request of the victim, periodic updates as to significant developments in the case;

* information about the availability of and the procedure to apply for financial assistance (e.g., witness fees, victim compensation) and social services; and

* how to register for CORI certification for advance notice of a defendant's release.

4. Describe Some Significant Victim Rights Now Mandated by this Statute to Ensure Victims a More Meaningful Role in the Criminal Justice System.

Newly codified victim rights include the right to confer with the prosecutor about the case at key stages of the prosecution: before trial; before a hearing on a motion to obtain psychiatric or other confidential records of the victim; before the prosecutor files a nolle prosequi or other motion to terminate the prosecution; and before the submission of a prosecutor's sentencing recommendation. The prosecutor is required to inform the judge of the victim's position on the sentencing recommendation, if known.

NOTE: The prosecutor is required to provide the victim with a notification form which is to include the victim's name, address and telephone number to enable the prosecutor to communicate with the victim.

5. Do Victims Now Have the Right to Request Confidentiality in Court?

Yes. Upon the court's approval of such a request, a judge may approve a request to limit in open court the disclosure of a person's residential address, telephone number, and place of employment or school. Orders may be directed to law enforcement, prosecutors, defense counsel, parole, probation and corrections.

NOTE: This new right is significant for victims of violent crimes, victims who fear retaliation, and victims who have relocated as a direct result of being victimized. This issue needs to be addressed **as soon as possible** by the prosecutor in conjunction with the victim/witness advocate and the victim before the information is provided to a defense attorney, for example, in a police report provided at the pretrial conference stage or at arraignment.

6. Do Victims and Family Members Have the Right to Be Present in the Court at All Court Proceedings?

Yes and No. Victims and family members have the right to be present at all court proceedings, unless the person is to testify and the judge determines that the testimony would be materially affected by hearing other testimony, and the judge orders the person to be excluded during that other testimony.

NOTE: When the issue of sequestration arises in a case, the burden is on the prosecutor to inform the judge of this newly codified victim right which is to be balanced by the prosecutor's responsibility to preserve the integrity of the case.

7. What Rights Do Victims Have Under the New Law to Be Heard in Court at the Time of Sentencing?

At the time of sentencing or disposition, a victim in a felony and in all crimes against the person or where physical injury results may offer an oral or written impact statement on the physical, emotional and financial effects of the crime as well as the victim's thoughts on a recommended sentence. Previously, chapter 258B provided this right only to victims and family members in felony and motor vehicle homicide cases.

8. Are There Any Significant Changes in the Relationship Between Probation Officers and Victims?

Yes. Victims have the right to confer with probation officers as part of the **presentence report** on a defendant. Probation officers are required to report the

victim's input to the court. The victim's input is deemed to be part of the presentence report.

After victims are notified of the final disposition of a case including the specifics of sentencing, victims have a right to a copy of the probation conditions within 30 days of the final disposition, and the name and telephone number of the probation officer assigned. Victims also have the right to a payment schedule in any case where **restitution** has been ordered. Probation officers are now required to notify victims in cases where a defendant is seeking to modify an order to pay restitution. Victims have the right to be heard at the modification hearing.

9. Are There Any Sanctions or Civil Remedies Against Prosecutors or Police Prosecutors for Failure to Deliver Services to Victims and Witnesses?

No. The Victim Rights Law affords victims and witnesses basic and fundamental rights "to the greatest extent possible subject to appropriation and to available resources." Victims who have suffered physical injury as a result of a crime are given priority status for services.

10. Are There Materials Available for Distribution Which Describe the Information and Services Which Must Be Provided to Victims?

Yes. The Massachusetts Office for Victim Assistance ("MOVA") has published a brochure entitled **The Massachusetts Victim Bill of Rights - Understanding Your Rights as a Crime Victim**. The brochure is currently available through MOVA, the Attorney General's Office and the District Attorneys' Offices.

MOVA is publishing a comprehensive victim guide entitled **Guide to Rights and Services for Crime Victims in Massachusetts** which will include all of the victim rights set forth in the new law. The victim guide will be available in December 1995. For further information, contact the MOVA office at (617) 727-5200.

ATTORNEY GENERAL EXPLAINS WHY CONSTITUTION PROHIBITS RESTORING THE DEATH PENALTY THROUGH A BALLOT QUESTION

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On August 1, 1995, an initiative petition was filed with the Attorney General to place a proposed law reinstituting the death penalty on the 1996 statewide ballot. As required by Amendment Article 48 of the Massachusetts Constitution, the Attorney General reviewed the petition, along with fifteen other petitions addressing different issues. On September 6, the Attorney General concluded that, because the core of the proposed death penalty law directly "relates to the powers of courts," which Article 48 prohibits any initiative petition from doing, the petition did not meet the constitutional requirements for appearing on the statewide ballot. The Attorney General offered to cooperate with the petition's sponsors to have his decision reviewed by the Supreme Judicial Court, but the sponsors have instead decided to drop their petition altogether. This article explains why the Constitution required the Attorney General to disapprove the petition.

When the voters established the statewide ballot question process by ratifying Amendment Article 48 in 1918, the voters themselves limited the scope of that process by adopting constitutional rules prohibiting fifteen specific types of laws from appearing on the ballot. For example, a proposed law is prohibited from appearing on the ballot if the law relates to religion, or makes an appropriation of money from the state treasury, or is restricted in its operation to particular cities or towns, or is inconsistent with certain constitutional rights such as freedom of speech and of the press and protection against unreasonable searches. The Constitution makes the Attorney General (subject to review by the Supreme Judicial Court) responsible for deciding whether it would be constitutional for a proposed law to appear on the ballot.

The Attorney General's duty under Article 48 is not to determine whether a proposed law itself would be constitutional, or to determine whether it would be good policy. His duty is limited to determining whether a petition contains the kind of law that the Constitution allows to be enacted by popular vote as well as by the Legislature. The Attorney General must, and does, make his decision based solely on the Constitution and on court decisions interpreting the Constitution. His personal views on whether a proposed law is good or bad policy must not, and do not, have any impact on his decision. If a petition proposes a kind of law that may not appear on the ballot, the Attorney General cannot approve the question for the ballot, even if many voters would like to vote upon it.

One of the fifteen categories of laws that may not appear on the ballot is a law that "relates to the powers of courts." The Supreme Judicial Court has ruled that a proposed law may appear on the ballot only if it is "disconnected with the courts in its main features" and only if its effect on the courts is merely "incidental and

subsidiary." Horton v. Attorney General, 269 Mass. 503, 511 (1929). A proposed law may not appear on the ballot if its "main thrust" or "main design" relates to the powers of courts. Massachusetts Teachers Association v. Secretary of the Commonwealth, 384 Mass. 209, 226 (1981); see Opinion of the Justices, 375 Mass. 795, 814-15 (1978). Most importantly, the Supreme Judicial Court has specifically ruled that a law extending the time for seeking a new trial in a death penalty case was a law that "relates to the powers of courts" and therefore, could not appear on the ballot. Commonwealth v. Sacco, 255 Mass. 369, 410-11 (1926).

The "main thrust" of the death penalty petition filed this year was to give the courts of the Commonwealth the power to impose the death penalty--a power unlike any other that the state courts currently possess. The petition not only would have conferred this new power but, in an effort to ensure that the new death penalty would not be struck down as unconstitutional by the Supreme Judicial Court, would have conferred other new powers, restricted existing powers, and set up entirely new court procedures. These included:

1. Giving the trial judge the power to impose the death sentence even if the defendant pleads guilty. The Commonwealth's previous death penalty law was struck down as unconstitutional by the Supreme Judicial Court precisely because that law did not give the trial judge the power to impose the death penalty in guilty-plea cases and therefore pressured defendants to give up their right to a trial. Commonwealth v. Colon-Cruz, 393 Mass. 150 (1984). Conferring such power on the court was therefore a central and critical feature of the petition, without which it could not have succeeded in reinstituting the death penalty.

2. Giving the jury the power and duty to decide whether the death penalty should be imposed, based on a sentencing hearing held before the jury. Under current law the trial judge imposes the sentence without input from the jury; the petition would have conferred power on the jury and thus decrease the power of the judge. Under the petition, if the jury found against the death penalty, the judge would have no power to overrule the jury. If the jury found in favor of the death penalty, the judge would have no power to impose the death penalty unless the jury made specific, written findings, unanimously and beyond a reasonable doubt, on specified issues. The judge would still have the power to overrule the jury, but the judge would have to give written reasons for doing so, and the prosecution would have the power to appeal this decision directly to the Supreme Judicial Court.

3. Giving the trial judge the power and duty to apply different rules of evidence to the defense and the prosecution at the sentencing hearing. The defense's evidence would be admitted even if it did not comply with the rules. The prosecution's evidence could be admitted only if it complied with the rules of evidence and only if it was given to the defense before the trial.

4. Giving the trial judge the power and duty, in any case where the death penalty is imposed, to review the entire record of the case and to report his or her observations to the Supreme Judicial Court on whether the death penalty was appropriate.

5. Giving the Supreme Judicial Court the power and duty to conduct its own review of the death sentence, even if the defendant chooses not to appeal the appropriateness of the sentence. The Supreme Judicial Court would have been required to examine four issues: whether the sentence (a) was influenced by passion or prejudice, (b) was imposed without sufficient evidence of an aggravating circumstance, or (c) was imposed against the weight of the evidence; or (d) whether the mitigating circumstances justified a sentence of life in prison. If so, the Supreme Judicial Court would have had the power to order a life sentence or a new sentencing hearing.

6. Giving the trial judge the power, at any time, to change the death sentence to a sentence of life without parole, without granting a new trial. If newly discovered evidence raised a substantial possibility that the conviction was unjust, or that the defendant's innocence might later be proven, the petition would have given the judge the power to suspend the death sentence or to change it to life without parole, even if the newly discovered evidence was not strong enough to justify a new trial.

7. Giving the Supreme Judicial Court the power and duty to issue a rule requiring that all possible defenses be considered and correctly asserted when and if appropriate. The rule would have included checklists to be used not only by defense lawyers but also by trial judges and prosecutors.

Of the eight new sections that the petition would have inserted into the Massachusetts General Laws, a majority--five out of eight--dealt exclusively with new court powers and procedures. The sixth dealt with the appointment of lawyers to represent defendants in death penalty cases; the seventh specified that execution would be by lethal injection; and the eighth specified the aggravating circumstances that could justify the imposition of the death penalty and the mitigating circumstances that the jury would have had to consider as reasons for imposing a lesser penalty.

Although one might isolate these particular features of the proposed law, and argue that if considered by themselves they have only an incidental or subsidiary

impact on the courts, the proposed law as a whole would have a major impact on the powers and procedures of courts. If those parts of the proposed law directly affecting courts were stripped away, the remaining parts would accomplish nothing, because the death penalty could still not be imposed. The "main thrust" of the law proposed by the petition therefore related directly to the powers of courts. For this reason the Attorney General was required to rule that the proposed law could not appear on the ballot, just as in the Sacco case the Supreme Judicial Court ruled that a law extending the time for seeking a new trial in a death penalty case could not appear on the ballot. 269 Mass. at 410-11.

The Attorney General's decision that the death penalty petition did not propose the kind of law that the Constitution allows on the ballot does not reflect any opinion as to whether the extensive procedures required by the law, if enacted by the Legislature, would be upheld by the Supreme Judicial Court as sufficient to protect a defendant's constitutional rights. The Legislature could enact such a law, and then the courts would determine its constitutionality. The Attorney General's role here was limited to determining that this kind of law cannot be enacted through the ballot question process.

Questions about the Attorney General's decision, or the ballot question process generally, may be directed to Peter Sacks, Deputy Chief of the Attorney General's Government Bureau, at (617) 727-2200.

THE ENVIRONMENTAL STRIKE FORCE AND THE POLICE: A PRODUCTIVE PARTNERSHIP

Bennet L. Heart
Assistant Attorney General, Environmental Strike Force

For the six years that the Environmental Strike Force (ESF) has been in existence it has benefitted considerably from fine work by police departments throughout the Commonwealth. While most of the police work in our cases is performed by the police officers assigned to the ESF from the Department of Fisheries, Wildlife and Environmental Law Enforcement, as well as the state police, a number of police officers from across the state have been instrumental in several of our successful prosecutions. The purpose of this article is to recognize the contributions of a few of these unsung heroes and to encourage the law enforcement community to think of the ESF when a serious environmental matter arises.

What is the Environmental Strike Force?

The ESF is an inter-agency enforcement body dedicated to the investigation and prosecution of serious environmental offenses in Massachusetts. The ESF's police force is comprised of five environmental police officers from the Department of Fisheries, Wildlife and Environmental Law Enforcement, and a state police officer. These officers work out of the Criminal Bureau of the Attorney General's office. The ESF's technical staff is made up of scientists, engineers and investigators from the Boston office of the Department of Environmental Protection (DEP), as well as its four regional offices in Woburn, Worcester, Springfield and Lakeville. Attorneys from the Environmental Protection Division and the Criminal Bureau of the Attorney General's office, along with the director of the DEP-ESF unit, work together as the ESF's legal staff. Cases investigated by the ESF may be prosecuted administratively, civilly, and/or criminally.

The ESF gets its cases a number of ways. Many cases are developed at DEP, often initially by non-ESF DEP staff activity. Cases are also developed through the proactive work of the ESF's police force and technical staff. Some cases are the result of a citizen "dropping a dime". Other cases are referred to us by government agencies, including police departments. This article highlights this last category of cases by describing the involvement of police officers in three cases prosecuted criminally by the ESF.

Three ESF Cases Where Police Officers Made the Difference

A Hazardous Waste Disposal in Gardner

In November 1993, an elderly Gardner resident was taking a walk on a dirt access road near Route 2 when he smelled a foul, chemical odor. Soon he

discovered five 55 gallon drums tipped over and leaking, leaving a dark stain in the ground around the drums. The Gardner Fire, Public Health and Police Departments were contacted, as was the DEP Emergency Response Unit. A second set of five tipped and leaking drums was discovered nearby. Samples from the drums revealed that they contained hazardous waste; specifically, highly flammable spent solvents such as ethyl benzene and toluene.

It was not readily apparent who committed this crime. Fortunately, Detective William Grassmuck of the Gardner Police Department had good relations with many people in Gardner, and two people called him to provide information about the incident. Through these informants and several additional interviews, Detective Grassmuck was able to gather strong evidence that a young man, Paul Kinzer, was responsible for the actual disposal of the hazardous waste, and that Kinzer had been hired to perform the illegal disposal by David Cosentino, an owner of a Gardner furniture refinishing company.

The ESF was contacted, and ESF environmental engineer Craig Dunlop, along with Environmental Police Officer Tony Wolski, performed further investigative work. ESF attorneys prosecuted Kinzer and Cosentino in Worcester Superior Court. Kinzer was convicted of knowingly disposing of hazardous waste in a manner which could endanger human health, safety, welfare or the environment. He received a one-year House of Correction sentence with six months to serve and he was ordered to pay full restitution for the cleanup costs.

Illegal Shellfishing Off The Coast of Fall River

In the Summer of 1991, Sergeant Michael Casper and Officer Arthur Joaquim of the Environmental Police were assigned to the Southeast Coastal Region of the state, with an emphasis on the enforcement of marine fisheries laws. One of the officers' areas of concern was illegal shellfishing in contaminated waters. One evening, Sergeant Casper observed that a 20 foot skiff was missing from a pier. Sergeant Casper knew that Michael Reynolds and James Bounakes had been fishing in the skiff on other occasions, and he had reason to believe that they had been shellfishing in contaminated waters because he had observed a pole commonly used for shellfishing in the skiff. Both Sergeant Casper and Officer Joaquim had also been involved with previous arrests of Reynolds and Bounakes for shellfishing in contaminated waters.

Sergeant Casper contacted Officer Joaquim, and the two officers took up a surveillance position on a moored battleship on the Fall River side of the Taunton

River. Using binoculars and night vision goggles, the officers were able to observe a small, unlighted boat with two men, one of whom was standing and engaged in raking motions consistent with shellfishing.

Officer Joaquim remained to observe the boat; Sergeant Casper returned to the marina to await the boat's return. Additional Environmental Police Officers and Fall River Police Officers were contacted. When the boat returned to the marina, Sergeant Casper observed Bounakes remove a number of large mesh bags full of something from the boat and place them in the trunk of a car. Sergeant Casper was aware that this type of mesh bag is commonly used to hold catches of shellfish. Sergeant Casper also observed Bounakes carrying the head of a bullrake, a device used for quahog fishing.

Bounakes and Reynolds then got in the car and drove away from the marina east on Ferry Street. They did not get far, however, for awaiting them were two Fall River police officers, Sergeant Stephen Ramos and Officer David Ramunno, who were parked in their cruisers facing west on Ferry Street and blocking both lanes of traffic. Sergeant Casper notified the officers by radio of the car's approach and they began proceeding west on Ferry Street with their blue lights and flashers on. Bounakes and Reynolds attempted to escape by making a u-turn, but they were stopped and arrested by Officers Ramos and Ramunno about a quarter-mile from the marina. Not surprisingly, the mesh bags in the trunk of the car were found to contain quahogs.

The ESF was contacted and additional investigative work was performed by Environmental Police Officer Richard Sylvia. An ESF attorney prosecuted Bounakes and Reynolds in Bristol Superior Court. Both Bounakes and Reynolds were convicted of illegal shellfishing after a jury trial and sentenced to 2 and 1/2 years at MCI Cedar Junction. This was the first state prison sentence imposed in Massachusetts for an environmental offense.

Illegal Asbestos Disposal in Milton

On September 2, 1993, the Milton Police Department learned that a number of bags of asbestos had been dumped in the area of Brush Hill Road and Dana Avenue in Milton. Milton Police Officer John Lank observed 13 large trash bags of what he described as asbestos wrap. Several of the bags were broken, and some of the bags' contents, which were dry, had spilled onto the road. Officer Lank took a sample of the asbestos that, when tested, proved to have a high asbestos content.

Officer Lank found a tag attached to a piece of debris in a bag indicating that an oil burner had been serviced by Lou's Heating Service of Medford on December 4, 1992, and providing the address and phone number for this business.

The Milton Police contacted Lou's Heating Service and learned that on December 4, 1992, the company made a service call to 97 Preston Street in Wakefield. Milton Police detectives Richard Mearns and Michael Devin went to this address and met with the owner of the building, Alfred Confalone. Confalone told the detectives that he had recently hired plumber Stephen Colantuno of Colantuno Heating Co. to install a new heating system. The detective observed pieces of pipe wrap on the basement floor that appeared to be made of asbestos. The detectives took a sample of this material; when tested, it was found to have a high asbestos concentration.

After speaking with Confalone, the detectives spoke with plumber Stephen Colantuno. Colantuno, an experienced plumber familiar with the requirement that asbestos be removed by a licensed asbestos removal contractor, told the detectives that he had hired one of his helpers, John Bernard, who he knew was not a licensed asbestos removal contractor, to remove and dispose of the asbestos surrounding the old boiler for $400.

The ESF was again contacted, and Environmental Police Officer Linda Thomas and State Police Officer John LaPan did additional investigative work. An ESF attorney then brought a criminal complaint against Stephen Colantuno in Malden District Court for illegal asbestos removal and contracting for the illegal disposal of solid waste. The court recently disposed of the case by imposing a continuance without a finding against Colantuno and ordering him to pay the town of Milton $1,500 in restitution. The ESF has recently applied for a criminal complaint against John Bernard in Quincy District Court and will prosecute this matter to its resolution.

Keep The Cases Coming

These three cases are examples of a productive partnership between police departments and the ESF. The ESF is eager to receive more referrals from police departments, and asks that you contact our office when you encounter a serious environmental matter. For the ESF police unit, call (617) 727-2200, ext. 2801 (for non-business hours, call the Environmental Police radio room at (800) 632-8075). For the DEP-ESF office, call (617) 556-1000. If you would like to learn more about environmental enforcement in the Commonwealth, the ESF can send you a binder on the subject compiled specifically for the law enforcement community. For a copy of the binder, contact Laura DiCenso of the ESF at (617) 727-2200.

MUNICIPALITIES HAVE RIGHT TO ENACT BY-LAWS REGULATING TRAFFIC CONTROL DETAILS

Jonathan Abbott
Assistant Attorney General, Administrative Law Division

This summer the Attorney General's Office approved three town by-laws regulating the use of paid police "details" for traffic control. The principle underlying each of these approvals is a recognition that, under established concepts of Home Rule, nothing in state law prohibits a town from deciding whether a police officer or a trained flagger is necessary to control traffic around a roadway construction site in the town. The rulings, which supported both a town's decision to employ flaggers and to rely exclusively on police, contain no opinion or implication about the desirability of either approach.

Each of the towns enacted different by-laws. Specifically, the Weymouth by-law requires that "all police details ... shall be performed by police officers." The Halifax by-law allows the use of "flaggers to direct traffic around construction sites so long as such will not impact or otherwise compromise public safety." The Plainville by-law allows the police chief to determine whether proposed construction will disrupt traffic or create a safety hazard. If so, then the chief determines whether a police officer or trained flag person is necessary. The Attorney General, in approving the by-laws, required that language be added to state that the power of towns to regulate details on state highways is limited.

Each statute cited in this article has exceptions and special requirements. Town officials interested in adopting a by-law on details are urged to consult with town counsel early in the drafting process. None of the by-laws approved by the Attorney General should be considered a "model" by-law. Moreover, this article does not discuss the impact of collective bargaining agreements on the use of flaggers. Further, town officials considering enacting traffic detail by-laws will want to review Boston Gas Co. v. Somerville, 420 Mass. 702 (1995), which limits the ability of municipalities to regulate utility activity.

The Attorney General's Power to Disapprove By-laws Is Limited

"The Attorney General's power to disapprove town by-laws [granted by G.L. c. 40, § 32] is limited. The Attorney General may disapprove a by-law only if it violates State substantive or procedural law." Amherst v. Attorney General, 398 Mass. 793 (1986). Further, "every presumption is to be made in favor of the validity of municipal by-laws." The Attorney General may not disapprove a by-law merely because he disagrees with the policy choices it represents.

Municipalities May Regulate Traffic Control

Several statutes allow local control of traffic; sometimes Highway Department approval is required. Towns may adopt by-laws regarding vehicles and traffic. See G.L. c. 40, § 22. See also, Commonwealth v. Berney, 353 Mass. 571 (1968); G.L. c. 85, § 10; c. 90, § 18. Toward that end, towns may also erect and maintain traffic control signals and devices. G.L. c. 85, § 2.

Flaggers are considered traffic control devices permitted by the Manual On Uniform Traffic Control Devices ["MUTCD"], 9/3/93, Part VI, §§ 6C, 6E, 6F. G.L. c. 90, § 14, permits local placement of traffic control devices at intersections. Thus, a town may permit flaggers to control traffic. Indeed, the Halifax by-law defines flaggers as "individuals ... recognized as traffic control devices, as defined in the MUTCD."

Police Officers Enforce Traffic Rules

Motorists must obey established traffic rules unless police officers direct otherwise, or unless there is a "traffic regulating sign, device or signal lawfully erected and maintained." G.L. c. 89, § 8. Legislation requiring drivers' obedience to police officers or traffic regulating devices does not negate the authority of a town to regulate traffic control in other circumstances or other ways.

Police officers (or traffic control devices) often regulate traffic at intersections, at stop signs, and around school buses, even when there are flashing lights. G.L. c. 89, §§ 8, 9; c. 90, § 14. These statutes indicate a legislative intent that police officers direct traffic in certain public safety circumstances. The MUTCD provides that police officers may be necessary in certain circumstances:

> Uniformed law enforcement officers may be used as flaggers in some locations, such as an urban intersection, where enforcement of traffic movement is important. Uniformed law enforcement officers may also be used [when] it is necessary to assure that advisory and regulatory speeds are being enforced.
>
> As the MUTCD makes clear, police officers are necessary and appropriate for traffic enforcement. However, a town may decide that for traffic control, rather than traffic enforcement, trained flaggers may be used.

Questions about by-laws may be directed to Assistant Attorney General Jonathan Abbott, Chief of the Municipal Law Unit, at (617) 727-2200.

ATTORNEY GENERAL ISSUES INFORMAL OPINION CONCERNING POTENTIAL ROLE OF PRIVATE AMBULANCE COMPANIES IN IMPLEMENTATION OF ENHANCED 911 SERVICE

Amy Spector & Judy Levenson
Assistant Attorneys General, Administrative Law Division

SUMMARY

In response to a request by the Executive Office of Public Safety ("EOPS"), Attorney General Harshbarger recently issued an informal opinion concerning whether the Statewide Emergency Telecommunications Board ("SETB" or the "Board") has authority, in implementing Enhanced 911 ("E-911") service, pursuant to G.L. c. 6A, §§ 18A-F, to designate private safety agencies (i.e., privately owned and operated ambulance companies) as secondary public safety answering points ("PSAPs").[1] The question of the Board's authority arises because the statutory agencies (i.e., divisions of state or municipal government) must serve as primary PSAPs; the statute is silent, however, as to whether public safety agencies similarly must serve as secondary PSAPs or whether private safety agencies can serve that function.

The informal opinion concludes that the Board is not precluded from approving a private ambulance company or other private safety agency as a secondary PSAP. This conclusion is of interest to the law enforcement community since, with Board approval of a municipality's E-911 plan, a police department, fire department or other public safety agency that serves as a primary PSAP may transfer or relay E-911 calls to private ambulance companies or other private safety agencies.

LEGAL ANALYSIS

Pursuant to G.L. c. 6A, § 18B(b), the Board is responsible for coordinating and implementing E-911 service. Enhanced 911 service consists of telephone network features enabling users of the public telephone system, by dialing the digits 911, to reach a public safety answering point ("PSAP"). A PSAP is a facility responsible for receiving 911 calls and, as appropriate, directly dispatching emergency response services or transferring or relaying E-911 calls to other public or private safety agencies. G.L. c. 6A, § 18A.

Each municipality within the Commonwealth that certifies to the Secretary of the Commonwealth that it accepts the provisions of St. 1990, c. 291, establishing the

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[1] Secondary PSAPs receive E-911 calls only when they are transferred from the primary PSAP (which must be a public safety agency such as a police or fire department or other division of state or municipal government that provides emergency services) or on an alternative routing basis.

SETB and E-911, is required to establish and operate a PSAP in a manner to be approved by the Board. Under the statute, a PSAP is assigned the responsibility of "transferring or relaying emergency 911 calls to other public or private safety agencies that provide the requested services." G.L. c. 8A, § 18A. The statute thus contemplates that the services ultimately provided in response to an E-911 call may be performed by either "public or private safety agencies." The question raised by EOPS, however, is whether a secondary PSAP itself may be a private safety agency.

The informal opinion explains that the statute distinguishes between primary and secondary PSAPs. Both primary and secondary PSAPs are equipped with automatic number identification and automatic location identification displays (which allow for automatic display of the telephone number and location of the telephone used to place a 911 call); however, a primary PSAP is distinguished from a secondary PSAP in that a primary PSAP is the first point of reception of an E-911 call, while a secondary PSAP receives E-911 calls only when they are transferred from the primary PSAP or on an alternative routing basis when calls cannot be completed to the primary PSAP. (As the informal opinion explains, the statute also provides for a third type of PSAP, a "ringing PSAP," which does not have capability to receive automatic number or location identification, and only receives E-911 calls that are transferred from a primary or secondary PSAP.) In addition, while the statute specifies that a "public safety agency" must serve as the primary PSAP, the statute does not contain language specifically requiring public safety agencies to serve as secondary PSAPs. The informal opinion reasons that the absence of language in the statute specifying that public safety agencies must serve as secondary PSAPs suggests that the Legislature intended that secondary PSAPs may be served by either public or private safety agencies.

Further, the informal opinion notes that considerations of public safety in ensuring prompt responses to E-911 calls, which underlie the statutory provisions governing implementation of E-911, support a reading of the statute that would enable private safety agencies to serve as secondary PSAPs. It refers to information provided by EOPS and by the Board which indicates that precluding private safety agencies from serving as secondary PSAPs and allowing them to serve only as ringing PSAPs could, in certain circumstances, lead to delays in the provision of emergency services to the person placing the 911 call. Delay could result because, in the circumstance in which, for example, a private ambulance company has been designated only a ringing PSAP (not a secondary PSAP) and thus is not authorized to be equipped with automatic number/location identification, an E-911 call placed to a primary PSAP would be transferred to the private ambulance company to provide emergency services; if the caller were unable to provide necessary information

concerning his or her telephone number or address, however (or if the private company inadvertently recorded the information incorrectly), the private ambulance company would be required to call back the primary PSAP to obtain the information needed to respond to the emergency, resulting in a delay in response time. On the other hand, if the private ambulance company itself were designated a secondary PSAP in the foregoing example, it would be equipped with automatic number/location identification, and the address location information would be displayed instantaneously on the company's telephone screen.

The informal opinion notes that, to the extent the Board expresses a concern about the potential misuse of automatic number/location identification information by private safety agencies designated to serve as secondary PSAPs, the Board's operational standards provide that subscriber information provided in accordance with the E-911 system shall be used only for the purpose of responding to emergency calls or for use in any ensuing investigation or prosecution, and that PSAPs must provide protection and confidentiality for automatic number identification and automatic location identification data. 560 C.M.R. § 2.06(1)(j). Additionally, those municipalities that contract with private safety agencies for services and seek to designate those agencies as secondary PSAPs could incorporate protections into the terms of their contracts to address any other concerns about the possible misuse of subscriber information.

For information, please contact Assistant Attorney General Judy Levenson, Opinions Coordinator, or Assistant Attorney General Amy Spector at (617) 727-2200.

RECENT CASES

I. SEARCH AND SEIZURE

A. Warrantless searches

No warrant needed for fire officials to search building immediately after fire extinguished, but suppression motion upheld as to second, administrative search where administrative warrant unduly broad. Commonwealth v. Jung, 420 Mass. 675 (1995)

After defendants' home burned, defendants were charged with arson, and arson-related crimes. Before trial, they moved to suppress evidence obtained during three inspections of their home, the first conducted without a warrant, the second with an administrative warrant, and the third by an insurance investigator. The defendants argued that all three inspections were improper absent a valid administrative or criminal search warrant. The defendants also moved to suppress statements made by them to the police, claiming that the statements were obtained in violation of their rights against self-incrimination.

The SJC found that evidence obtained during the first search, which occurred just after the fire was extinguished, did not require suppression, as officials needed no warrant "to remain in a building for a reasonable time to investigate the cause of a fire after it has been extinguished." As to the evidence seized during the second inspection, the Court held that suppression was required as a result of the undue breadth of the administrative warrant which authorized a search of the entire house, despite the investigators' conclusion that the fire had originated in the basement. As to the third search, the Court remanded for more evidence regarding the extent of cooperation between police and fire officials with the insurance investigator, and the possibility that such cooperation rendered the investigator a state agent, triggering Fourth Amendment protection. Lastly, the Court declined to suppress the defendants' statements to police, concluding that no Miranda warnings were required where the defendants were not "in custody" during their interrogations.

Warrantless search of dumpster on commercial premises held unlawful where contents not accessible or visible to public, no exigent circumstances prevented authorities from obtaining search warrant, and consent to search constituted acquiescence to a show of lawful authority. Commonwealth v. Krisco Corp., 421 Mass. 37 (1995)

Defendant corporation and its president, who operated an auto repair and paint shop, were charged with several counts of unlawful transfer of hazardous waste to an unlicensed person. Based on a tip from a disgruntled former employee, an agent of the Environmental Crimes Strike Force conducted a lengthy surveillance of the shop and a dumpster located in an alley adjacent to the shop. The alley

was generally closed to the public except during trash collections by a private contractor. On Thursdays, shortly before the dumpster was emptied, the Strike Force investigator observed shop employees throwing paint cans into the dumpster. During the trash collection, the investigator observed the president of the shop pass what was believed to be money to the driver of the truck.

After receiving information by walkie-talkie that paint cans had just been placed in the dumpster, another Strike Force employee entered the shop and announced that she intended to conduct an administrative inspection. After showing some slight initial reluctance, the defendant asked that the inspection proceed quickly because he was busy. During the inspection, Strike Force agents climbed into the dumpster and seized several paint cans which contained hazardous residues.

The SJC affirmed the allowance of the defendants' motion to suppress. The Court held that the defendants had a reasonable expectation of privacy in the contents of the dumpster which was neither accessible nor visible to the general public and which was intended for their exclusive use. Moreover, because the Strike Force's lengthy surveillance had revealed paint cans being placed into the dumpster on nearly every Thursday at basically the same time of day, the Court concluded that the agents could have obtained a warrant in advance of the search. Finally, the individual defendant had not been informed that he could demand that the inspector obtain a warrant, and hence, the Court held that his "consent" to the inspection was involuntary because it amounted to no more than "acquiescence to a show of lawful authority."

Terry stop upheld where despite anonymity of phone tip, information that gun was concealed in a car required immediate police activity. Commonwealth v. Alverado, 38 Mass. App. Ct. 650 (1995)

Based on an anonymous telephone tip that several men were in a blue car with a gun wrapped in a towel, police proceeded to the address, searched the car and arrested the driver. The defendant challenged his conviction on the ground that the police did not have reasonable suspicion sufficient to warrant a Terry stop where the caller's tip did not have an indicia of reliability.

The Massachusetts Appeals Court upheld the stop holding that possession of a handgun, coupled with a reasonable suspicion that the weapon was concealed, permitted a Terry stop. The Court pointed out that the risk of imminent danger distinguished the tip from one concerning possession of drugs. Furthermore, the Court noted that information about a concealed gun suggested an illicit activity requiring immediate police action. Finally, the tipster's statement to police that he had "seen the wrapped gun in the car" provided police with a reasonable basis to believe that the caller's knowledge, although anonymous, was based upon personal observation.

Exigent circumstances justified warrantless search where probable cause to arrest did not exist until controlled buy occurred. Commonwealth v. Lopez, 38 Mass. App. Ct. 748 (1995)

Using an unfamiliar informant, police set up a controlled buy of cocaine from a defendant in his apartment. Following the buy, the informant and an undercover officer left the apartment, after which the surveilling police officers immediately entered the apartment, seized marked bills, and arrested the defendant.

The Massachusetts Appeals Court held that because the police did not have sufficient probable cause to obtain a warrant prior to the buy, and because the defendant could have destroyed the marked bills if the police had not acted immediately, exigent circumstances justified the warrantless search and arrest.

Warrantless entry into apartment of suspected drunk driver immediately following a car accident unlawful where police had insufficient reason to believe driver was hurt, rather than just drunk. Commonwealth v. DiGeronimo, 38 Mass. App. Ct. 714 (1995)

The defendant was involved in a car accident, immediately after which the operator of the other car noticed that the defendant was unsteady on his feet, slurred his speech, and then drove off without lights in the evening. The witness advised a police officer of his observations, and based on that information, the officer went to the defendant's apartment. The defendant did not open the door, and because the officer could hear a television, he had his department call the defendant to make sure he was okay. The line was busy, and as a result, the officer entered the apartment and found the defendant exhibiting signs of alcohol usage. The defendant admitted to having had alcoholic drinks that night.

The defendant appealed his OUI conviction on the ground that his attorney failed to adequately pursue a motion to suppress evidence from the apartment. The Appeals Court reversed the conviction, holding that the warrantless search was not justified by exigent circumstances as the officer had insufficient reason to believe that the defendant was hurt, as opposed to drunk.

Importantly, the Appeals Court also noted that a warrantless search is not permitted, even if destruction of evidence of alcohol use might have occurred, unless the Commonwealth demonstrates that it was "impracticable for the police to obtain a warrant" under the circumstances.

Seizure of contraband in plain view permissible while awaiting arrival of search warrant where officer observed contraband when defendant lunged for object out of officer's view. Commonwealth v. Navarro, 39 Mass. App. Ct. 161 (1995)

A police officer placed two telephone calls to buy heroin. The same person, not the defendant, answered.

Shortly after the second call, the officer waited by the phone as instructed. Within fifteen minutes, a female approached the officer and sold him 3 glassine bags of heroin, each bearing an identical logo. The female was arrested.

Concerned that the defendant might become suspicious when her friend did not return, officers went to the apartment and secured it to prevent the removal or destruction of drugs. The officers informed the defendant that they were obtaining a warrant, and that she could stay or leave, but that if she left, she would be searched. The defendant said she wanted to leave and take some clothing. As she entered a bedroom accompanied by an officer, the defendant lunged toward an object. The officer, fearing for his safety, lunged toward the same object, and grabbed an open pocketbook containing, in plain view, 5 glassine bags of white powder with the same logo as seen earlier, hypodermic needles and syringe, and plastic bags of pills. During the execution of the warrant, police further discovered a blanket near the defendant's pocketbook, in which 27 glassine bags of heroin were secreted, all bearing the previously seen logo.

The Appeals Court held that the search of the pocketbook was lawful, where the police were justified in securing the apartment prior to the warrant's arrival, and the officer was justified in protecting his safety by grabbing the pocketbook. Because the contraband was in plain view, it was legally seized.

The Court did, however, conclude that the trial judge should have granted the defendant's directed verdict motion on the intent to distribute charge where the evidence was insufficient to connect the defendant to the 27 bags of heroin. The Court stated that the existence of a hypodermic needle and syringe in the defendant's pocketbook made it equally plausible that the defendant was a purchaser and user of drugs, as opposed to a distributer.

Search upheld where independent police corroboration compensated for deficiency in basis of knowledge prong of Aguilar-Spinelli test. Commonwealth v. Washington, 39 Mass. App. Ct. 195 (1995)

Based on a reliable informant's tip, the police conducted a search and found cocaine. The defendant challenged his trafficking conviction on the ground that the basis of knowledge prong of Aguila-Spinelli was not satisfied by police corroboration. The reliable informant had said that a large black man named Gene would be leaving a particular house with another individual, and would go to a particular car. Officers were immediately dispatched to the targeted address, and observed a man whom they knew as Gene leave the specified apartment with another man, and get into the specified car. The police arrested the defendant, and a pat frisk revealed a large amount of cash and a beeper; his companion was carrying 97 bags of cocaine. The Court held that the police had sufficient independent corroboration to satisfy any deficiency in the basis of knowledge prong of the test.

B. Searches with a warrant

Search of defendant and car upheld based on reliability of informant's tip, and search of defendant's locker at fire station permissible where no reasonable expectation of privacy existed there. Commonwealth v. Welch, 420 Mass. 646 (1995)

An informant told police that the defendant would deliver cocaine to another person and provided details, such as time and place, about the expected meeting. Although no one showed up to meet the defendant at the established time and place, the police officer searched him and his car, and placed the defendant under arrest for possession of drugs.

After the arrest, the deputy chief of the fire department where the defendant worked as a firefighter, consented to a narcotics detection dog sniffing the outside of the four lockers, including the defendant's, located in the "lieutenant's room", a common area. Based on the information found at the fire station, the police obtained and received a search warrant for the defendant's locker and found contraband upon the execution of the warrant.

The SJC rejected the defendant's challenges to the searches, holding that the officer had probable cause to initially stop and search the defendant and his car based on "police corroboration of virtually every detail of the informant's tip regarding the defendant and his behavior, together with certain indicia of reliability in the tip itself." In addition, the Court held that the defendant did not have a reasonable expectation of privacy in the "lieutenant's room" at the fire station, and that, in any event, the deputy chief consented to the search.

Appeals Court reversed suppression order where deficiencies in basis of knowledge prong of Aguilar-Spinelli test satisfied by police corroboration. Commonwealth v. Powers, 39 Mass. App. Ct. 911 (1995)

The police obtained a search warrant for the defendant based on information provided by two informants (CI-1 and CI-2). The trial court allowed the defendant's motion to suppress the evidence seized as a result of the warrant. The Appeals Court reversed.

CI-1's previous assistance to police had led to several convictions, establishing the "veracity" prong of the Aguilar-Spinelli test. In addition, CI-1 had bought cocaine within 10 days of the application for the warrant from an individual allegedly involved in dealing cocaine supplied by the defendant. Because the foundation for the information regarding the supplier was not readily apparent from the affidavit, the application was inadequate under the "basis of knowledge" prong of Aguilar-Spinelli.

CI-2 had previously assisted the police in several controlled buys, but the affidavit failed to state that his assistance had led to convictions or seizure of drugs. Accordingly, the Appeals Court characterized whether the Commonwealth had satisfied the

veracity test as "tenuous". With regard to the "basis of knowledge" prong, CI-2 had bought cocaine four times during the month preceding the affidavit, and had made a controlled buy four days before the application for the warrant was submitted, from a person who had allegedly been supplied the cocaine by the defendant. In addition, CI-2 reported that the defendant lived in Florida, drove a Cadillac, and had transported cocaine from Florida to the targeted area on several occasions.

During the controlled buy, the affiant had observed a yellow Cadillac with Florida plates in the driveway of one of the involved individuals. After seeing the same car in the same driveway on two additional dates, police conducted a license check and discovered that the car was registered to the defendant, and that he had been previously convicted of cocaine trafficking.

The Appeals Court concluded that although the affidavit did not establish either informant's basis of knowledge that the defendant was the source of the cocaine, when viewed in conjunction with the police officer's observations of the car at a location where a controlled buy had occurred and the information gathered concerning the car, the affidavit was sufficient to support the search of the defendant's person both inside and outside of the targeted residence.

II. EVIDENTIARY ISSUES

Show-up identification sixteen days after crime not impermissibly suggestive and evidentiary hearing not warranted; expert opinion on cross-racial identification correctly excluded at trial. Commonwealth v. Walker, 421 Mass. 90 (1995)

After ordering a cup of coffee, the defendant robbed the manager of a Dunkin' Donuts in Boston at gunpoint. The manager was able to observe the defendant for about four minutes, immediately reported the robbery to the police, and provided a detailed description of the robber. Two weeks later, the manager was working at a different Dunkin' Donuts in Boston and saw the defendant in the store. As soon as he left, she called the police and reported that the defendant was walking toward an MBTA station. The police then spotted the defendant, carrying a Dunkin' Donuts bag, and brought him to the store where the manager positively identified him as the robber.

The defendant argued on appeal that the show-up was impermissibly suggestive on account of the sixteen days between the crime and the show-up, and he further alleged that he was entitled to an evidentiary hearing on the motion to suppress the identification. The Court held that the defendant's affidavit in support of his motion failed to establish a triable issue of suggestiveness and he was not entitled to an evidentiary hearing on the issue. The Court further held that where the manager's recollection of the defendant was fresh, and where she had had an excellent opportunity to observe the defendant, the advantages of an immediate identification at the shop overrode any suggestiveness. The

Court firmly stated that the procedure constituted sound police practice. The Court also ruled expert evidence on cross-racial identification was correctly excluded by the trial judge.

Detective's "ruse" of false report of defendant's handprint and fingerprints found at scene did not render statements involuntary when considered in totality of circumstances. Commonwealth v. Selby, 420 Mass. 656 (1995); Commonwealth v. Edwards, 420 Mass. 666 (1995)

Police officers arrested and booked the defendants for murder and read them their Miranda rights from a printed form. Both defendants signed or initialled the forms, and indicated their willingness to provide statements without the presence of an attorney. During questioning, one of the detectives asked defendant Edwards "how his handprint could have been in the building if his statement ... was true", even though the police had not found a handprint in the building. The defendant thereafter confessed, repeated his statement on tape, and reacknowledged his receipt of Miranda. During separate questioning, the police asked a different defendant, Selby, how his handprint could have been found inside the house given his previous statement that he had remained outside the building. Selby then changed his story, and agreed to have his new statement tape-recorded. The detective then asked Selby to explain how his fingerprints were found on shell casings found at the scene. Following Selby's answer, the detective asked him whether he had anything to add before shutting off the recorder, to which Selby replied "no". After a short break, Selby asked the police to destroy his previous statement so that he could "tell what really happened", and the police again advised him of his Miranda rights.

In separate appeals, both defendants argued that their subsequent statements, issued after their initial waivers, were rendered invalid because the detectives coerced their inculpatory comments by using a "ruse" that they had found the defendants' fingerprints and/or handprints at the scene of the crime. Selby additionally contended that he had invoked his right to remain silent by answering "no" to the question whether he had anything to add to his statement.

The SJC rejected the defendants' arguments regarding the "ruse", recognizing that "trickery alone may not invalidate a waiver if there is evidence, in light of the other surrounding circumstances, that the waiver was made voluntarily." While expressing disapproval of the use of false evidence to elicit information, the Court noted that both defendants' waivers preceded the "ruse", and both defendants were lucid and alert at all times. Once a valid waiver is obtained, the police are not required to readvise a suspect of Miranda rights nor obtain a second waiver "absent a break in the interrogation", such as assertion of Fifth Amendment rights, a request for counsel, or a significant lapse of time

between the waiver and the subsequent statements.

The SJC also rejected Selby's second contention concerning his alleged invocation of the right to remain silent. The Court firmly stated that answering "no" to the question asked was "merely an indication that [the defendant] had finished his statement and the machine could be shut off". To invoke a right previously waived, an individual must clearly articulate that he is invoking the right.

Massachusetts Appeals Court reversed dismissal of OUI defendant's indictment originally allowed based on a delay in release on bail where defendant failed to request independent examination or blood test. Commonwealth v. Bailey, 39 Mass. App. Ct. 908 (1995)

The defendant was arrested for operating under the influence. She was booked at approximately 7:30 a.m., but a clerk-magistrate did not appear to release her on bail until about eight hours later, despite three calls by the police to the magistrate. The District Court granted the defendant's motion to dismiss, holding that the eight-hour delay denied the defendant her right to be considered for bail with reasonable promptness, and unreasonably delayed her right to obtain potentially exculpatory evidence.

The Appeals Court reversed, holding that because the defendant never requested either an immediate independent physical examination or blood test under G.L. 263, §5A, and did not demonstrate prejudice, she was not entitled to dismissal of the indictment.

Out-of-court statements admissible to demonstrate probable cause for forfeiture. Commonwealth v. Fourteen Thousand Two Hundred Dollars, 412 Mass. 1 (1995)

At a forfeiture trial, a police officer testified that a tow company employee had called and reported that he had found a bag of money and cocaine in the forfeiture claimant's car. The employee did not testify at the trial.

The forfeiture claimant challenged his conviction on the ground that the officer's testimony should not have been admissible. The SJC affirmed the conviction, holding that because the officer's testimony went to his state of mind and "in turn the reasonableness of the Commonwealth's decision to institute the forfeiture action ..." and not for the truth of the statement itself, the testimony was properly admitted into evidence. The Court continued by declaring that out-of-court statements are admissible to prove probable cause to institute a forfeiture proceeding, and that the burden is on the claimant to prove that the monies are not forfeitable.

Absence of significant details from police report permits jury instruction that prior inconsistent statements may be used to assess credibility of officer. Commonwealth v. Ortiz, 39 Mass. App. Ct. 70 (1995)

An undercover police officer ordered a small amount of cocaine from a cocaine delivery service under investigation. He was instructed to go to a local parking lot. A short while later, the defendant drove into the parking lot, stopped near the officer's car, and motioned to the officer to follow him, by car, to a nearby secluded street. There, the officer approached the defendant's

car, and was asked by the defendant what he wanted. The officer answered "one sixteenth", whereupon the defendant handed him the requested cocaine and said that all future purchases were to be made at a different location. The police officer filed a report which failed to include that the defendant had motioned to the officer, had asked the officer what he wanted, and had discussed future transactions.

The Appeals Court, noting that it would be natural for a police officer to include such important details in a police report, ruled that the absence of those details amounted to a prior inconsistent statement which permitted a jury instruction that the inconsistencies could be used to assess the officer's credibility.

A defendant's videotaped confession held admissible despite involuntary nature of first confession where waiver of second statement was knowing, voluntary, and intelligent. Commonwealth v. Prater, 420 Mass. 569 (1995)

The defendant confessed twice to murder. The trial judge suppressed the first confession because the defendant's intoxication prevented him from waiving his Miranda rights knowingly, intelligently, and voluntarily. However, 90 minutes later, the defendant repeated his confession on videotape, after having been re-Mirandized. The Court upheld the denial of the motion to suppress the videotaped confession.

The presumption that a second confession is "tainted" where the first confession is rendered inadmissible was held to be inapplicable because there was a "break in the stream of events sufficient to insulate the second confession from the circumstances of the first confession", and because the second confession was not motivated by a feeling that the defendant had nothing to lose since the "cat was out of the bag" already.

III. CRIMINAL STATUTES INTERPRETED

Defendant Lent's trial permissible in Commonwealth pursuant to G.L. c. 277, § 62, where victim's death would not have ensued but for violence which occurred in the Commonwealth.

Defendant Lewis Lent kidnapped a 12-year old boy at knifepoint in a Pittsfield theater and, under threat of death, took the boy to his Pittsfield apartment. There, he taped the victim's wrists and ankles to a bed and attempted to rape him. The defendant then decided the victim had to die, so he took the victim to the woods in Newfield, New York, blindfolded and strangled him. The boy was found about a month later, and an investigation by the New York State Police led to the defendant's confession.

The only issue in Massachusetts was whether G.L. c. 277, § 62, permitted the defendant to be tried in the Commonwealth. The statute provides "If a mortal wound is given, or if other violence of injury is inflicted, or if poison

is administered, in any county of the commonwealth, by means whereof death ensues without the commonwealth, the homicide may be prosecuted and punished in the county where the act was committed" (emphasis added). The SJC held that such "other violence or injury" does not have to be lethal, as long as it is the "but for" cause of death; that is, the death would not have ensued if the violence in Massachusetts had not occurred. The kidnapping and attempted rape in Massachusetts, coupled with the fact that the defendant's decision to kill the victim was based on these events, demonstrated that death would not have occurred absent the violence in Massachusetts. Accordingly, the Court permitted the trial to go forward.

A railroad trestle is not a "building" for purposes of prosecution for malicious destruction of property under G.L. c. 266, § 127. Commonwealth v. Anderson, 38 Mass. App. Ct. 707 (1995)

Two defendants were convicted of malicious destruction of property under G.L. c. 266, § 127, because they had spray painted racist propaganda on a railroad trestle. The Massachusetts Appeals Court reversed their convictions, holding that section 127, which provides for an enhanced penalty for destruction or injury to "the personal property, dwelling house or building of another ... if such destruction is wilful or malicious" (emphasis added), did not apply to the present case where a railroad trestle could not be considered a building. The Court based its decision on the fact that the preceding section of the statute prohibits defacing "objects", as well as the fact that Massachusetts courts have historically construed the word "building" narrowly.

SEARCH WARRANTS FOR BUSINESS RECORDS

Law enforcement officers routinely apply for search warrants to seize business records. Usually, only sworn police officers are present at these searches, but circumstances might arise where an individual other than a police officer, such as a prosecutor or victim, may need to provide assistance during the execution of the warrant. Although under federal law, private citizens have been permitted to participate in the execution of search warrants in limited circumstances, the appellate courts in the Commonwealth have not yet ruled on the issue. In order to avoid any unnecessary problems, the best possible practice is for the affiant to include, on the face of the application, the names of all persons who will be present during a search. Be mindful, however, that pursuant to G.L. c. 276, § 2, search warrants "shall be directed to the sheriff or his deputy or to a constable or police officer."

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The main office number for all extensions listed below is (617) 727-2200; TTY-(617) 727-4765. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

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